IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,
Petitioners,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

No. 1076

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,
Petitioner,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Relevant Docket Entries

1. *District Court* (Dkt No. 3379-66)

December 27, 1966—"Complaint to Enjoin Enforcement of Secretary of Agriculture of the United States and for Declaratory Relief" and "Motion for Preliminary Injunction" filed by Plaintiffs.

January 5, 1967—"Motion of New England Milk Producers' Association, et al., for Leave to Intervene as Defendants" filed.

January 11, 1967—"Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction" and "Defendant's Motion for Order Consolidating Hearing on Plaintiffs' Motion for Preliminary Injunction with Hearing on Motion(s) for Summary Judgment, and Fixing Expedited 'Timetable' Schedule for Consolidated Hearing" filed.

January 13, 1967—Hearing on Motion for Preliminary Injunction and Motion for Leave to Intervene

January 16, 1967—"Preliminary Injunction" and "Order Denying Applicants' Motion for Intervention" entered.

January 23, 1967—"Motion for Order Authorizing Maintenance of Suit as Class Action Under Rule 23(c)" filed by Plaintiffs.

January 30, 1967—"Motion of Plaintiffs To Add Parties Plaintiff"

January 31, 1967—Hearing on Class Action Motion

February 1, 1967—"Order" authorizing maintenance of suit as class action entered and "Order" denying defendant's motion for extension of time entered.

February 15, 1967—"Order" granting motion to add 163 additional plaintiffs.

February 24, 1967—"Motion for Leave to Intervene as Defendants" filed by Zuber, et al.

February 24, 1967—"Plaintiffs' Motion for Summary Judgment" filed.

February 27, 1967—"Answer" filed by Defendant.

March 3, 1967–Hearing on Motion to Intervene.

March 6, 1967—"Defendant's Motion for Extension of Time Within which to Respond to Plaintiffs' Motion for Summary Judgment" and "Defendant's Motion for Order Directing further Proceedings in Litigation be Held in Abeyance Pending Exhaustion of Administrative Remedies" filed.

March 13, 1967—"Opposition of Plaintiff to Motion for Order Directing Action To Be Held in Abeyance, and to Motion for Extension of Time."

March 13, 1967—"Order Denying Motion to Hold Proceedings in Abeyance" and "Order Extending Time" entered.

March 17, 1967—"Consent" of plaintiffs to filing of brief *amicus curiae* by Frederick T. Zuber, et al.;"Designation of Parts of Admin. Record."

March 17, 1967—"Modification of Preliminary Injunction" by consent order entered.

March 20, 1967—"Opposition to Plaintiffs' Motion for Summary Judgment" filed by Defendant.

March 20, 1967–Excerpts from Administrative Records filed by Government with Court

March 21, 1967—"Order Denying Applicants' Motion for Intervention" (Zuber, et al.) entered.

April 20, 1967—"Summary of 1963 Promulgation Hearing Record for Mass.-R.I. Order."

May 2, 1967—"Order" denying motion of Dairymen's League Cooperative Assoc., Inc., to file a brief amicus curiae.

May 10, 1967—"Copy of Letter", dated May 8, 1967 from Charles Patrick Ryan to Lawrence D. Hollman, Esq.

May 10, 1967—"Copy of Letter", dated April 20, 1967, from Charles Patrick Ryan to Irwin Goldbloom, Esq.

May 15, 1967—"Summary of Hearing Record in Promulgation of 1936 Greater Boston Milk Order."

May 15, 1967—"Summary of Hearing Record Amending and Reinstating Boston Order, 1937."

May 15, 1967—"Summary of Hearing Records for Worcester, Mass., Springfield, Mass., and Southeastern New England."

May 15, 1967—"Motion for Leave to File Brief as Amicus Curiae" filed by Commonwealth of Massachusetts.

May 16, 1967—"Consent to Motion for Filing of Brief Amicus by Commonwealth of Massachusetts and Plaintiffs' Memorandum of Points and Authorities in Opposition to Such Brief" filed.

May 16, 1967—Hearing on Motion for Summary Judgment

May 22, 1967—"Order Granting the Commonwealth of Massachusetts Leave to File Its Brief as Amicus Curiae" entered.

May 22, 1967—"Affidavit" of Charles P. Ryan (exhibit)

May 24, 1967—"Memorandum" by the Court granting summary judgment and directing Plaintiffs' counsel to submit a proposed order.

May 31, 1967—Plaintiffs' proposed "Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief" filed.

June 15, 1967—"Defendant's Opposition to Plaintiffs' Proposed Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief" filed.

June 15, 1967—"Reply of Plaintiffs to Opposition to Proposed Orde-"; "Supplemental Reply of Plaintiffs."

June 15, 1967—"Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief" (Plaintiffs' proposed order) entered.

July 6, 1967—"Order" of USCA denying motion for stay of District Ct. order and granting leave to Zuber, et al., to intervene to appeal.

July 7, 1967—"Order Granting Intervention" (Zuber, et al.) and "Order" temporarily preserving status quo (by consent)

July 10, 1967—"Notice of Appeal" by Zuber, et al. filed.

July 14, 1967—"Motion for Order Preserving Effectiveness of Judgment and For Defendant and Others To Show Cause Concerning Noncompliance Therewith" filed by Plaintiffs

July 24, 1967—"Defendant's Opposition To Plaintiffs' Motion for Order Preserving Effectiveness of Judgment and For Defendant and Others to Show Cause Concerning Noncompliance Therewith" filed by Defendant

July 31, 1967—"Reply to Defendant's Opposition To Plaintiffs' Motion for Order Preserving The Effectiveness of Judgment, and For Defendants and Others To Show Cause Concerning Noncompliance Therewith" filed by Plaintiffs

August 11, 1967—"Motion for Preservation of Status Quo Pending Appeal of Order of Summary Judgment dated June 15, 1967 and For Other Relief" filed by Zuber et al. with Supporting Memorandum

August 14, 1967—"Notice of Appeal" by Defendant

August 18, 1967—"Opposition to Motion Entitled 'Motion for Preservation of Status Quo Pending Appeal of Order of Summary Judgment Dated 6/15/67 and for Other Relief' filed herein by Defendant Intervenors" filed by Plaintiffs

August 24, 1967—"Motion by Commonwealth of Massachusetts for Leave to File Memorandum as Amicus Curiae In Support of Motion of Intervenors for Preservation of Status Quo" filed by Massachusetts with Memorandum

August 24, 1967—"Motion of State of Connecticut for Leave to File Memorandum as Amicus Curiae in Support of Intervening Defendants' Motion for Preservation of the Status Quo" filed by Connecticut with Memoranda

August 25, 1967—"Supplemental Memorandum of Points and Authorities In Support of Motion for Preservation of Status Quo" filed by Zuber et al.

August 29, 1967—"Memorandum" granting Motions of Massachusetts and Connecticut to file memorandum as amicus curiae

September 1, 1967—"Plaintiffs' Points and Authorities in Opposition To Memorandum Amicus Curiae filed by the State of Connecticut" filed by Plaintiffs

September 1, 1967—"Motion by State of Vermont for Leave to File Brief Amicus Curiae in Support of Plaintiffs' Motion to Preserve Effectiveness of Judgment and in Opposition To Defendant Intervenors' Motion for Stay" filed by Vermont

September 1, 1967—"Plaintiffs' Supplemental Points and Authorities in Support of Motion to Preserve The Effectiveness of Judgment & In Opposition to Motion for Stay" filed by Plaintiffs

September 1, 1967—"Affidavit" of Stewart Johnson filed by Zuber et al.

September 4, 1967—"Notice to Produce" filed by Plaintiffs.

September 5, 1967—Hearing before Judge McGarraghy on pending Motions

September 8, 1967—Proposed Order filed by Zuber et al.

September 8, 1967—Plaintiffs Proposed Order re its Motion to Preserve Effectiveness of Judgment

September 11, 1967—"Plaintiffs' Objections To Proposed Order Preserving The Status Quo" filed by Plaintiffs with a proposed Order

September 12, 1967—"Defendant's Objections to Plaintiffs' Proposed Order Regarding Denial of Plaintiffs' Motion For Preservation of the Effectiveness of the Judgment" filed by Defendant

September 12, 1967—"Intervenors' Reply To Plaintiffs' Objections To Proposed Order Preserving The Status Quo" filed by Zuber et al.

September 15, 1967—"Counter Reply of Plaintiffs Concerning Proposed Order" filed by Plaintiffs

September 15, 1967–"Order" entered by Judge McGarraghy preserving the status quo pending appeal

September 15, 1967–"Order" entered by Judge McGarraghy denying Plaintiffs' Motion for Preservation of the Effectiveness of Judgment

2. *Court of Appeals* (Dkt. No. 21,141)

Relevant Docket Entries

July 18, 1967–Certified original record (3 vols.) and Clerk's copy of transcript also (3 vols.) and 1 vol of duplicate transcript and 1 package of exhibits containing 2 vols. (2-n)

July 26, 1967–appellees' motion to hold proceedings in abeyance, for consolidation, and for other relief (m-26)

July 28, 1967–appellant's statement of points (m-28)

July 28, 1967–appellant's statement as to joint appendix (m-28)

August 1, 1967–appellants' opposition to motion to hold proceedings in abeyance etc. (m-1)

August 2, 1967–appellees' reply to opposition to motion to hold proceedings in abeyance etc. (m-2)

August 7, 1967–Per Curiam order denying appellees' motion to hold proceedings in abeyance; for consolidation of cases, and for other relief; appellants' brief shall be filed on August 15th, appellees' brief shall be filed on August 29th and appellants' reply brief on September 5th; if Secretary of Agriculture determines to prosecute appeal from the order of the District Court on appeal herein, the court will entertain a motion for consolidation. Danager, McGowan and Robinson. Circuit Judge McGowan did not participate in the foregoing order.

August 7, 1967–appellees' motion for leave to file supplemental joint appendix (3 copies of exhibits) in lieu of printing in joint appendix (p-7)

August 7, 1967—appellees' counter-designation of record for joint appendix (p-7)

August 8, 1967—appellants' motion for permission to file brief in excess of 50 pages (p-8)

August 9, 1967—appellees' opposition to motion for leave to file brief in excess of 50 pages (m-9)

August 9, 1967—appellants' opposition to motion for leave to file supplemental joint appendix (p-9)

August 10, 1967—Order denying appellees' motion for leave to file supplemental joint appendix [illegible] of reprinting parts in a joint appendix, directing [illegible]' attention to rule 16(j). Burger, CJ

August 10, 1967—Order granting appellant's motion for permission to file a brief in excess of 50 pages, but not to exceed 60 pages. Burger, CJ.

August 10, 1967—appellants' motion to extend time to file the joint appendix to August 21st (p-10)

August 10, 1967—appellees' response to motion to extend time to file joint appendix and counter motion to include parts of record designated by appellees in the joint appendix (m-10)

August 14, 1967—Order granting appellants' motion to extend time to file joint appendix until August 21st. Burger, CJ.

August 14, 1967—appellees' motion to withdraw counter-motion for order directing appellants to include appellees' designation in joint appendix (m-14)

August 14, 1967—appellees' motion for leave to file brief in excess of 50 pages (m-14)

August 15, 1967—appellants' brief

August 22, 1967—appellants' motion to extend time to file joint appendix to August 30, 1967 (m-22)

August 24, 1967—appellants' brief and service

August 29, 1967—Order granting appellants' motion to extend time to file joint appendix until August 30th. Wright, CJ.

August 29, 1967—appellees' motion to lodge brief of appellee pending ruling of appellees' motion for leave to file brief in excess of 50 pages (p-29)

August 29, 1967—motion of State of Vermont for leave to file brief as amicus curiae (p-29) (c)

August 29, 1967—motion of State of Connecticut for leave to file brief as amicus curiae (c)

August 29, 1967—motion of Commonwealth of Massachusetts for leave to file brief as amicus curiae (c)

August 29, 1967—Order authorizing appellees to file a brief not to exceed 60 pages without prejudice to a renewal thereof upon a showing that an additional 10 pages are required to reply to amicus curiae briefs.

August 29, 1967—Order granting appellees' motion to withdraw counter-motion for order directing appellants to include appellees' designation in joint appendix.

August 29, 1967—appellee's brief.

August 30, 1967—joint appendix and service

August 31, 1967—appellants' consent to the filing of brief as amicus curiae by State of Vermont

September 5, 1967—appellees' opposition to motion of Commonwealth of Massachusetts for leave to file brief as amicus curiae (m-5)

September 5, 1967—appellees' opposition to motion of State of Connecticut for leave to file brief as amicus curiae (m-5)

September 5, 1967—Appellants' reply brief

September 7, 1967—appellees' motion to withdraw motion to lodge brief in excess of 50 pages pending ruling of court as to the same (m-7)

September 12, 1967—appellants' motion for consolidation of this appeal with the appeal noted by the Secretary of Agriculture below and for an expedited hearing (p-12)

September 13, 1967—appellants' reply brief and service

September 15, 1967—appellees' motion for summary affirmance or dismissal of appeal (p-15)

September 19, 1967—appellees' opposition to motion to consolidate and for an extension of time for argument in the event of consolidation (m-19)

September 20, 1967—appellants' opposition to appellees' motion for summary affirmance or dismissal of appeal (m-20)

September 21, 1967—appellees' reply to opposition to motion for summary affirmance or dismissal (m-21)

September 26, 1967—Order consolidating with 21308 for all purposes; appellant's, Secretary of Agriculture, brief due October 9th, appellees' October 25th, Secretary's reply brief due October 31st; directing clerk to schedule appeals for argument as soon after October 31st as business of court will permit; denying appellants' motion for additional time to argue without prejudice to filing of new motion for relief, before October 25th; any similar request on behalf of parties shall be submitted on said date to permit clerk to transmit matters to assigned division; directing clerk to hold in abeyance appellees' motion for summary affirmance of District Court's judgment or dismissal of appeal and to transmit same to division which will be assigned to hear argument on merits. Danaher, CJ.

October 5, 1967—Per Curiam order granting motion of State of Vermont, Commonwealth of Massachusetts, and State of Connecticut leave to file brief amicus curiae and directing clerk to file lodged briefs. Danaher, Leventhal and Robinson, CJ.

October 5, 1967—brief amicus curiae of the State of Vermont and service

October 5, 1967—brief amicus curiae of the Commonwealth of Massachusetts and service

October 5, 1967—brief amicus curiae of the State of Connecticut and service

October 19, 1967—Certified original supplemental record including transcript of proceedings (p. 1-25) (N-5)

October 19, 1967—appellants' motion for additional time for oral argument (m-19)

October 26, 1967—appellees' opposition to motion for additional time for argument (m-26)

November 7, 1967—Per Curiam order granting appellants' motion for additional time for oral argument; each side allotted 45 minutes for presentation of oral argument; total allotted time is 90 minutes Burger, Wright, McGowan, CJ's

November 7, 1967—Argued before Burger, Wright, McGowan, CJ's

January 4, 1968—motion of appellees for leave to file supplemental memorandum (m-4)

January 4, 1968—motion of appellees to require appellants to file additional bond (m-4)

January 11, 1968—appellants' opposition to motion for leave to file supplemental memorandum (m-11)

January 11, 1968—appellants' opposition to motion to require filing of an additional bond by Zuber et al (m-11)

January 12, 1968—appellees' reply to opposition to motion for leave to file supplemental memorandum (m-12)

January 12, 1968—appellees' reply to opposition to motion to require filing of additional bond by appellants' Zuber, et al (m-12)

February 5, 1968–Per Curiam order denying appellees' motion to require the filing of additional bond by appellants; appellees' motion for leave to file a supplemental memorandum is granted; Clerk is directed to file appellees' lodged memorandum Burger, Wright, McGowan, CJ's

February 5, 1968–appellees' supplemental memorandum

August 7, 1968–appellants' motion for leave to file supplemental memorandum

August 14, 1968–Appellees' opposition to motion for leave to file supplemental memorandum (m-14)

August 20, 1968–Appellants' reply to opposition to motion for leave to file a supplemental memorandum (m-20)

September 11, 1968–Appellees' motion for leave to file supplemental memorandum (m-11)

September 16, 1968–Appellants' opposition to motion to file supplemental memorandum (m-16)

September 23, 1968–Opinion per Circuit Judge McGowan

September 23, 1968–Judgment affirming judgment of the District Court and remanding case to District Court for further proceedings consistent with the opinion of this Court

October 7, 1968–Appellee's printing bill (p-7)

October 8, 1968–Appellants' motion for stay of mandate pending application for certiorari (p-8)

October 11, 1968–Appellees' opposition to motion to stay mandate and to continue escrow arrangement (m-11)

October 11, 1968–Appellants' response to appellees' bill of costs (m-11)

October 14, 1968–Appellees' motion to require bond or other security and for other relief (m-14)

October 15, 1968–Appellees' response to appellants' opposition to bill of costs (m-15)

October 15, 1968–Appellants' reply to opposition to motion to stay mandate and to continue escrow arrangement (p-15)

October 18, 1968–Appellants' opposition to motion to require bond or other security and for other relief (m-18)

November 1, 1968–Appellants' motion to transmit original record to Supreme Court (m-1)

November 5, 1968–Appellees' motion consenting to motion to transmit original record to Supreme Court (m-4)

November 15, 1968–Order directing clerk to transmit original record to Supreme Court

November 19, 1968–Appellant's designation of record for use in Supreme Court (m-19)

November 20, 1968–Certified record prepared

November 20, 1968–Certified original record transmitted to Supreme Court

November 20, 1968–Receipt from Clerk, Supreme Court for original record, supplemental record and 2 volumes of exhibits

December 2, 1968–Per Curiam order denying motion to require posting of bond Burger, Wright and McGowan, CJ's

December 2, 1968–Per Curiam order approving appellees' bills of costs Burger, Wright and McGowan, CJ's

December 2, 1968–Per Curiam order directing clerk to stay transmittal of opinion and judgment for time permitted by law for filing of petition for certiorari; and granting appellants motions to continue the escrow arrangements Burger, Wright and McGowan, CJ's

December 20, 1968–Appellees' designation of record (m-20)

December 20, 1968–Certified record prepared

December 23, 1968–Certified notice from Clerk, Supreme Court, of filing of petition for writ of certiorari on December 20th SC 861 OT 68

April 11, 1969–Certified copy of order of the Supreme Court allowing certiorari on April 7th

3. *Court of Appeals* (Dkt. No. 21,308)

Relevant Docket Entries

September 22, 1967–Certified original record (no transcript) (n-2)

September 26, 1967–Order (in case 21141) consolidating with 21141 for all purposes; appellant's, Secretary of Agriculture, brief due October 9th, appellees' October 25th Secretary reply brief due October 31st; directing clerk to schedule appeals for argument as soon after October 31st as business of court will permit; denying appellants' motion for additional time to argue without prejudice to filing of new motion for relief, before October 25th; any similar request on behalf of parties shall be submitted on said date to permit clerk to transmit matters to assigned division; directing clerk to hold in abeyance appellees' motion for summary affirmance of District Court's judgment or dismissal of appeal and to transmit same to division which will be assigned to hear argument on merits. Danaher, CJ.

October 2, 1967–appellants' motion to dispense with printing of joint appendix (m-2)

October 2, 1967–appellant's statement of points (m-2)

October 9, 1967–brief for appellant

October 13, 1967–Order granting appellant's motion to dispense with printing of joint appendix Burger, CJ

October 16, 1967–brief and service for appellant

October 19, 1967–appellants' motion for additional time for oral argument (m-19)

October 25, 1967—appellees' brief

October 26, 1967—appellees' opposition to motion for additional time for argument (m-26)

October 27, 1967—appellees' motion for summary affirmance of District Court judgment or dismissal of appeal (p-27)

October 31, 1967—appellant's reply brief

October 31, 1967—appellees' brief and service

October 31, 1967—appellees' opposition to motion for summary affirmance or dismissal of appeal (m-30)

November 2, 1967—appellees' reply to opposition to motion for summary affirmance or for dismissal (m-1)

November 3, 1967—appellant's reply brief and service

November 7, 1967—Per Curiam order granting appellants' motion for additional time for oral argument; each side allotted 45 minutes for presentation of oral argument, total allotted time is 90 minutes Burger, Wright, McGowan, CJ's

November 7, 1967—Argued before Burger, Wright, McGowan, CJ's

January 4, 1968—motion of appellees for leave to file supplemental memorandum (m-4)

January 10, 1968—appellants' opposition to motion of appellees for leave to file supplemental memorandum (m-10)

January 16, 1968—appellees' reply to opposition to motion for leave to file supplemental memorandum (m-12)

February 5, 1968—Per Curiam order denying appellees' motion to require the filing of additional bond by appellants; appellees' motion for leave to file a supplemental memorandum is granted; Clerk is directed to file appellees' lodged memorandum Burger, Wright, McGowan, CJ's

February 5, 1968—4-appellees' supplemental memorandum

August 6, 1968–appellants' motion for leave to file decision rendered subsequent to argument (m-6)

August 16, 1968–Appellees' opposition to motion for leave to file supplemental memorandum and court decision (m-16)

August 19, 1968–Appellees' motion for leave to amend or correct opposition to appellant's motion for leave to file memorandum (m-17)

August 26, 1968–Appellants' reply to opposition to motion for leave to file supplemental memorandum and court decision (m-26)

September 11, 1968–Appellees' motion for leave to file a supplemental memorandum (m-11)

September 16, 1968–Appellant's opposition to motion to file supplemental memorandum (m-16)

September 23, 1968–Opinion per Circuit Judge McGowan

September 23, 1968–Judgment affirming judgment of the District Court and remanding case to District Court for further proceedings consistent with the opinion of this Court

October 7, 1968–Appellees' bill of costs (p-7)

October 8, 1968–Appellants' motion to stay mandate to December 23rd and to continue escrow arrangement (m-8) (CM 10/21)

October 11, 1968–Appellees' opposition to motion to stay mandate and to continue escrow arrangement (m-11)

October 14, 1968–Appellants' response to bill of costs (m-14)

October 14, 1968–Appellees' motion to require bond or other security and for other relief (m-18)

October 15, 1968–Appellees' reply to appellant's response to bill of costs (m-15)

October 18, 1968–Appellants' opposition to motion to require bond or other security (m-18)

December 2, 1968–Per Curiam order denying motion to require posting of bond Burger, Wright and McGowan, CJ's

December 2, 1968–Per Curiam order approving appellees' bills of costs Burger, Wright and McGowan, CJ's

December 2, 1968–Per Cuiam order directing clerk to stay transmittal of opinion and judgment for time permitted by law for filing of petition for certiorari; and granting appellants' motions to continue the escrow arrangments Burger, Wright and McGowan, CJ's

December 20, 1968–2-Appellees' designation of record (m-20)

December 20, 1968–Certified record prepared

February 24, 1969–Notice of filing of petition for certiorari from Clerk, Supreme Court, on February 20th (SC 1076 OT 68)

April 11, 1969–Certified copy of order of Supreme Court allowing certiorari on April 7th

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

[Filed December 27, 1966]

Civil Action No. 3379-'66

1. RUSSELL ALLEN, New Haven, Vermont
2. JAMES O. PHILLIPS, R. D. No. 2, Middlebury, Vermont
3. DWIGHT BURNHAM, R. D. 2, Vergennes, Vermont
4. DWIGHT BESSETTE, R. D. 2, Vergennes, Vermont
5. HENRY LA FLAM, Bristol, Vermont, *Plaintiffs,*

v.

ORVILLE FREEMAN, Secretary of Agriculture
of the United States, *Defendant*

Complaint to Enjoin Enforcement of Order of Secretary of Agriculture of the United States and for Declaratory Relief

1. This court has jurisdiction of this action under the Agricultural Marketing Agreement Act of 1937, as amended, 50 Stat. 246, 7 U.S.C. 601 et seq.; Title 11, Sec. 521, D.C. Code, 1961 Ed., Supp. V, 1966; 28 U.S.C. 2201-2 (Declaratory Judgment Act); Art. III of U.S. Constitution; 5 U.S.C. 1001 et seq. (Administrative Procedure Act); and under 28 U.S.C. 1331-7, giving the Court jurisdiction over any Act of Congress regulating commerce.

2. The plaintiffs are dairy farmers who produce and sell milk under the federal order regulating the handling of milk in the Massachusetts-Rhode Island Marketing Area, 7 C.F.R. 1001, hereinafter called the "Order". The said Order purports to have been issued by the defendant under the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter called the "Act", effective on October 1, 1964. The plaintiffs are producers as defined in said Order and they sell their milk to handlers regulated under the Order. The plaintiffs bring this Action for them-

selves, individually, and also for the benefit of all other persons in their class who are similarly situated. This is an action to establish the rights of the plaintiffs in their own behalf and also for the many producers similarly situated in the states of Vermont, Maine, Massachusetts, New Hampshire, and other states whose milk is sold to handlers regulated under the Order.

3. The defendant is Orville L. Freeman, Secretary of Agriculture of the United States, whose official residence is Washington, D. C.

4. The said Order is in effect at the present time. The Order, in general, provides for the classification of milk in accordance with the use made thereof by the handler to whom it is sold or the form in which it was disposed of by him, and the order fixes minimum prices to be paid by the handler for each use classification.

The Order provides for the marketwide pooling of all milk sold to regulated handlers and for the equalization of payments to producers through the operation of a Producer Settlement Fund, subject to certain specified adjustments.

The Act authorizes the foregoing terms and conditions in the milk orders promulgated by defendant to provide "for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;". The Act authorizes certain adjustments to the uniform or "blended" price to be received by producers but it specifically states that the "blended" or uniform price is subject only to the enumerated adjustments or differentials. (7 U.S.C. 608c(5)(B)(ii)). In conformity with the Act, the Order also provides a method of adjusting the payments by regulated handlers to the end that the total sums paid by each handler shall equal the value

of the milk purchased by him at the prices fixed for the various use classifications under the Order. Those handlers who dispose of their milk primarily in the higher use classification and whose value of fluid milk products is therefore higher than the blended or uniform price are required to pay the difference into the Producer Settlement Fund for payment over to the handlers whose value of fluid milk products is less than the uniform or blended price, and this enables all producers to receive such uniform price irrespective of the use that is made of his milk by the handler to whom it has been delivered.

5. Section 1001.32 of the Order requires the defendant's agent, the Market Administrator for the Massachusetts-Rhode Island milk order, to publicly announce (1) by the 25th day of the month the Class I price for the following month, as computed under the Order; (2) by the 5th day of the month, the Class II price for the preceding month, as computed under the Order, and (3) by the 12th day of the month, the blended or uniform price, as computed under Sec. 1001.64 of the Order.

The Class I price referred to above concerns the classification of milk used for fluid purposes, which is assigned a higher value and price under the Order than Class II milk, which is used primarily for manufacturing purposes.

Under the Order, the handlers, on or before the 5th day of the month, pay each producer for the approximate value of milk received from him during the first 15 days of the previous month, which payment is at a rate not less than the Class II price for the month.

On or before the 20th day of the month, each handler makes final payment to each producer for the total value of milk received from him during the previous month at not less than the basic blended or uniform price per hundredweight, adjusted by the zone, butterfat, and farm location differentials applicable under Sections 1001.62,

1001.71, and 1001.72, minus the amount of the payment previously made to the producer on the 5th day of the month. The Order also requires each handler to submit reports to the Market Administrator concerning the receipts of milk from producers each month and the amounts sold in each use classification, as well as other detailed information, by the 8th day of the month for the previous month, in order that the Market Administrator may compute the value of fluid milk products for each handler and advise him by the 15th of the month of the amount of his debit or credit to the Producer Settlement Fund. Any debit in the account of a handler owed to the Fund must be paid by him on or before the 18th of the month to assure the payment of the uniform or blended price to producers by the 20th of the month.

6. The zone differential referred to as an adjustment to the basic uniform or blended price is covered under Sec. 1001.62 of the Order. It provides for a schedule of mileage zones from the plant at which the handler receives the producer milk to the primary consumption center of Boston. The center zone is 201-210 miles from Boston, and deliver to plants located closer to Boston require (sic) the addition of a price differential which varies in accordance with the mileage from Boston. As the distance from Boston increases by zones over the 201-210 center zone, a price differential is applied against the uniform or blended price in successively larger amounts for each zone progressively away from Boston and the center zone. There is no quarrel with this differential, for it reflects primarily a transportation cost of milk removed from the consumption center. The milk must be transported by the handler from the plant where it is received, and such an adjustment is authorized under the Act as an adjustment for "the locations at which delivery of such milk is made". Such higher payment to the producer located near the market consumption center in the form

of this zone differential is warranted on the basis of a saving to the handler in transportation costs. The amount of the differential also embraces a specified portion thereof for an additional saving to the handler by virtue of direct delivery to a city or nearby zone plant or handler. This eliminates the necessity of double handling, etc., which occurs when milk is delivered to a country plant and is subsequently transferred to the city or nearby zone plant. The plaintiffs do not challenge either of such consolidated differential payments or adjustment in this action, nor do they contest the butterfat differential referred to previously, since it is obvious that milk with a certain butterfat content should command an appropriate differential and the handler is warranted in making a price differential payment based thereon.

7. The previously referred to "Farm Location" differential of Sec. 1001.72 of the Order is challenged herein, however, as illegal and unauthorized under the Act under which the Secretary purports to have promulgated the same. Such Order provision sets up two payment areas, one in which the differential payment is 46 cents per hundredweight and the other 23 cents per hundredweight. The Order provision sets forth the names of certain cities, townships, counties and States in the two respective differential areas, and provides that farms located within any of the specified places are entitled to the appropriate differential payment in addition to the uniform or blended price. These payments of the farm location differential are analogous to the "special nearby location" differential of the New York-New Jersey milk order, 7 C.F.R. 1002.71(b), and are also paid out of the marketwide pool or Producers Settlement Fund, thus reducing pro tanto the amount of the uniform or blended price and the amount that the plaintiffs and others in their class would otherwise receive for their milk. The differential effects a partial exemption from the marketwide pooling required

under the Act and under which the Order operates. The Order provision provides, both in respect to the 46 and 23 cents payments, that such additions to the uniform price for the favored few shall cease when said amounts or any part thereof equals the Class I or fluid milk price. The entire 46 or 23 cents is not paid when a lesser sum will equal the Class I or fluid milk price, a feature similar to the utilization percentage schedule of the New York-New Jersey milk order which provided that the "nearby" differential payments to producers located within 120 miles of New York City should cease when Class I or fluid milk utilization in the market reached 80% of the total milk marketed. In both instances the Class I price is reserved and assured to the producer whose farm is located in the "nearby" area, thus violating the Act's command that each producer shall receive a uniform price for his milk irrespective of the uses made of such milk. Such differential payment geared to Class I or fluid use is clearly violative of the Act. If all of the milk marketed under the Order was for Class I or fluid use, no "nearby" or "farm location differential would be paid, thus further indicating that the differential is an illegal utilization differential. It is not a differential based upon the locations at which delivery of milk is made, as contemplated by the Act, such as the transportation and direct delivery differentials received by such "nearby" producers.

8. The nearby farm location differential is not only unauthorized under the Act, but it is not even one of the specified adjustments allowed thereunder. Payment from the pool or Producer Settlement Fund is not authorized under the Act, and this constitutes the removal of monies from one producer and the discriminatory and arbitrary payment of the same over to the "nearby" producer without any compensation and without due process of law.

9. The said differential also constitutes a trade barrier and interferes with the free flow of commerce between

states as effectively as a customs duty levied upon such milk equal in degree to such differential, thereby reserving the Class I or fluid milk market to a favored group of producers in violation of the Act and contrary to good and decent milk marketing.

10. The defendant promulgated said differential provision on October 1, 1964, without making any basic finding supported by evidence that would support such Order differential and his action was arbitrary and irrational, in that he based the promulgation of such differential provision on the ground that the differential had been paid under prior orders and upon the ground that they had previously been "adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets". 29 F.R. 5590. His findings relate only to the alleged fact that "it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time.", whereas under the Act he is required to find that all of the terms and conditions of the Order will tend to effectuate the declared policy of the Act, a totally different thing. His referral to a previous finding in another order that "It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed" is not supported by any evidence of a valid nature, refers to proceedings under a prior order, and is an illegal criterion under the Act, for the Act prohibits any variance from the uniform price to certain producers based upon the use of their milk—whether such use refers to past historical use, present use or future use of a producer's, or group of producers', milk.

11. The nearby farm differential is also violative of Sec. 608c(7)(D) of the Act which requires that any terms

and conditions in such Order be incidental to, and not inconsistent with, the terms and conditions specified in Sec. 608c(5)-(7) of the Act and that they be necessary to effectuate the other provisions of the Order. In addition to a violation of Sections 608c(A) and (B) of the Act pertaining to uniform prices, it is also violative of Sec. 608c(5)(G) relating to the prohibition or limitation of the marketing of milk in any marketing area of milk or any product thereof produced in any production area of the United States. It is also violative of Sec. 608c(5)(D) of the Act, which provides that the only limitation that may be provided for in respect to the marketing of a producer's milk is that in respect to a producer just entering the market, in that he may be awarded a Class II price for the first two months in supplying the market.

12. Upon information and belief, the plaintiffs and their class have never been located so as to be eligible for farm location differential payments. During the years 1964, 1965 and 1966, the defendant throught (sic) his Market Administrator effected the transfer of substantial monies from plaintiffs and their class in the approximate amount of $300,000.00 per year, said differential being a charge on all milk delivered by plaintiffs, amounting to 3,000 to 4,000 lbs. of milk per day for each individual plaintiff and approximately 5.9 per hundredweight. The unlawful deduction effected by defendant in the computation of the uniform price and the corresponding loss to plaintiffs and their class will continue to occur in like amount in the future under said Order provision despite the ilegality (sic) thereof unless the relief requested herein is granted.

13. Under Sec. 1001.32(j) of said Order, the Market Administrator is required to announce not later than the 12th day of January, 1967, the uniform or "blended" price payable to producers for milk delivered during the month of December, 1966. Unless the relief sought herein is granted, the defendant through his Market Administrator

will then announce such price, computed under Sec. 1001.64 of said Order, thereby deducting said differential payments from the pool belonging in equity to all producers and reducing the amount which plaintiffs and their class are entitled to receive and illegally transferring funds of one producer to another. Such monies belonging to thousands of producers will be unlawfully diverted by defendant's action, giving rise to undue hardship, lack of practical recovery thereof, multiplicity of actions of doubtful nature, and infringement of the right to receive payments for their milk at a price computed without deduction of the nearby farm differential.

14. Plaintiffs and their class are not afforded a method of administrative relief in the Act or otherwise. Upon information and belief, they are without an adequate remedy at law.

15. The plaintiffs and their class are threatened with definite, immediate and irreparable injury, loss and damage.

16. A copy of the Act, the Order and the defendant's recommended and final decision in promulgating said Order are attached hereto and made a part hereof as if fully set forth herein.

WHEREFORE, the plaintiffs pray:

1. That a temporary restraining order be issued enjoining the defendant through his Market Administrator from computing and announcing the uniform or blended price under the Order in such manner as to subtract monies for payment to nearby farm producers from the uniform or blended prices to be paid to producers, and requiring defendant to compute, announce and cause to be paid to producers a uniform or blended price without consideration for or deduction, diversion or transfer of the payments unlawfully contained in the Farm Location Differential

provision of said Order; or, in the alternative, requiring such computation and announcement to provide that any subtraction of moneys from producers for the benefit of other producers whose farms are located in such "nearby" areas is contingent upon further order of this court, and requiring the collection, deposit and retention of such monies in an escrow fund or the registry of this court until further order thereof or for the pendency of this cause.

2. That a preliminary injunction be issued during the pendency of this action enjoining the defendant through his market administrator as provided in the foregoing prayer and requiring the defendant to compute, announce and cause to be paid to producers the uniform or blended price as aforesaid; or, in the alternative, to require the aforesaid action and escrowing of said monies until further order of this court or for the pendency of this cause.

3. That a preliminary injunction be issued during the pendency of this action and perpetually thereafter enjoining the defendant throught his (sic) Market Administrator from enforcing the Farm Location Differential provision of said Order, 7 C.F.R. 1001. 72, and requiring the payment of the uniform or blended price to producers without deduction of said differential.

4. That the said Order provision be declared to be unauthorized by law, illegal and void.

5. That the aforesaid restraining orders and injunctions be made binding upon the defendant, his Market Administrator for said Order, and their respective agents, attorneys and employees.

6. That the court grant such other and further relief as to it may seem just and proper, including costs, ~~interest~~ and attorney fees.

JAMES O. PHILLIPS
James O. Phillips

Dr. Ray Collins

RUSSELL ALLEN
Russell Allen

DWIGHT BURNHAM
Dwight Burnham

DWIGHT BESSETTE
Dwight Bessette

HENRY LA FLAM
Henry La Flam,
Plaintiffs.

State of Vermont
County of Addison, ss:

James O. Phillips, being first duly sworn, deposes and says that he has read the foregoing Complaint by him subscribed, that he knows the contents thereof, that the allegations and things stated therein are true to his own knowledge, except such as stated upon information and belief, and as to such matters and statements he verily believes them to be true; and that unless the relief requested herein is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage.

JAMES O. PHILLIPS
James O. Phillips

Subscribed and sworn to before me this 22 day of December, 1966.

ISOBEL C. DUNN
Notary Public

State of Vermont
County of Addison, ss:

Russell Allen, being first duly sworn, desposes and says that he has read the foregoing Complaint by him subscribed, that he knows the contents thereof, and that the things and matters therein stated he verily believes to be true; and that unless the relief requested herein is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage.

RUSSELL ALLEN
Russell Allen

Subscribed and sworn to before me this 23rd day of December, 1966.

DWIGHT E. BURNHAM, JR.
Notary Public

State of Vermont
County of Addison, ss:

Dwight Burnham and Dwight Bessette, being first duly sworn, depose and say that they have read the foregoing Complaint by them subscribed, that they know the contents thereof, and that the things and matters therein stated they verily believe to be true; and that unless the relief requested herein is granted, plaintiffs will suffer immediate and irreparable injury, loss and damage.

DWIGHT BURNHAM
Dwight Burnham

DWIGHT BESSETTE
Dwight Bessette

Subscribed and sworn to before me this 23 day of December, 1966.

DWIGHT E. BURNHAM, JR.
Notary Public

State of Vermont
County of Addison, ss:

Henry La Flam, being first duly sworn, deposes and says that he has read the foregoing Complaint by him subscribed, that he knows the contents thereof, and that the things and matters stated therein he verily believes to be true; and that unless the relief requested herein is granted, plaintiffs will sustain immediate and irreparable injury, loss and damage.

HENRY LA FLAM
Henry La Flam

Subscribed and sworn to before me this 23 day of December, 1966.

DWIGHT E. BURNHAM, JR.
Notary Public

CHARLES PATRICK RYAN
Charles Patrick Ryan
400 Prudential Building
1334 G Street, N.W.
Washington, D. C. 20005
Attorney for Plaintiffs.

[Filed Dec. 27, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

JAMES O. PHILLIPS, et al.,
Plaintiffs,

v. Civil Action No. 3379-'66

ORVILLE L. FREEMAN, Secretary
of Agriculture of the U.S.,
Defendant.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, James O. Phillips, Dr. Ray Collins, Russell Allen, Dwight Burnham, Dwight Bessette and Henry La Flam, individually and as representatives of their class of milk producers similarly situated, move the Court for an order granting a preliminary injunction enjoining the defendant, Orville L. Freeman, Secretary of Agriculture of the United States, and his statutory agent, the Market Administrator for the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001, their agents, attorneys and employees, from computing and announcing the uniform or blended price for pool milk delivered in December, 1966, pursuant to said Order in such a manner as to subtract therefrom the monies of milk producers for payments of the Farm Location differentials, 7 C.F.R. 1001.72, to "nearby" producers, and requiring the defendant, his said Market Administrator, their agents, attorneys and employees, to compute, announce and cause to be paid to all producers a uniform or blended price for their said milk delivered in December, 1966, and thereafter, without the subtraction or deduction of such differential therefrom under said Order; or, in the alternative, requiring that such computation and announcement of the uniform or blended prices to provide that the producers' monies representing said Farm Location differential not be paid over to the "nearby" milk producers specified in 7 C.F.R. 1001.72, but that the same be collected, placed

and retained in a special escrow account of the registry of this Court by defendant, his said Market Administrator, their agents, attorneys and employees, in respect to the amounts that would otherwise be payable in January, 1967, for pool milk delivered in December, 1966, and each succeeding month for such milk delivered the previous month, and further providing that defendant, his said Market Administrator, their agents, attorneys, and employees, shall keep such records as will disclose the amounts so set aside, the sums which would otherwise be payable to individual milk producers in the Farm Location differential areas, and the quantities of pool milk delivered in December, 1966, and thereafter by each milk producer delivering milk subject to pricing and pooling under said Order, and further requiring that defendant, his Market Administrator for said Order, their agents, attorneys and employees, take all necessary action to effectuate the foregoing collection, placement and retention of the disputed differential payments and that all records and calculations regarding and identifying the source of the funds, the nearby producers, and the amounts to which they would have been entitled under said Order be retained by defendant, his said Market Administrator, their agents, attorneys and employees, who shall report to the Court and plaintiffs' attorney each month the total of such amount so collected, placed and retained, all of the foregoing during the pendency of this action or until further order of the Court, all upon the grounds set forth in the verified Complaint and in accordance with the prayers as set forth therein and also for the reasons appearing in plaintiffs' Points & Authorities attached hereto and made a part hereof, said grounds including the following:

(1) That defendant has performed the acts complained of since October 1, 1964, under said Order, and he will continue to perform the same unless restrained by the Court.

(2) Such action has resulted in irreparable injury, loss and damage to plaintiffs, and they will continue to sustain definite, immediate and continuing injury, loss and damage in the future unless defendant is restrained by this Court.

(3) The issuance of such preliminary injunction will not cause undue inconvenience or injury to defendant, but will prevent irreparable injury and hardship to plaintiffs and their class.

/s/ Charles Patrick Ryan
Attorney for Plaintiffs
400 Prudential Bldg.
ST 3-0004

[Filed Jan. 5, 1967]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

RUSSELL ALLEN, et al.,
Plaintiffs,

v. Civil Action No. 3379-66

ORVILLE L. FREEMAN,
Secretary of Agriculture
of the United States,
Defendant,

NEW ENGLAND MILK PRODUCERS' ASSOCIATION, et al.,
Applicants for Intervention.

MOTION OF NEW ENGLAND MILK PRODUCERS' ASSOCIATION, CONNECTICUT MILK PRODUCERS ASSOCIATION, LOCAL DAIRYMEN'S COOPERATIVE ASSOCIATION, INC., PRODUCERS DAIRY COMPANY, MASSACHUSETTS COOPERATIVE MILK PRODUCERS FEDERATION, INC., AND MODERN MILK MARKETING ASSOCIATION, FOR LEAVE TO INTERVENE AS DEFENDANTS.

The applicants move, on the grounds set forth herein, for leave to intervene as defendants in this action, generally and in order to assert the defenses set forth in a Memorandum of Points and Authorities in Opposition to the Plaintiffs' Motion for Preliminary Injunction, to be filed prior to the hearing on said Motion.

Each of the applicants is an organization of milk producers, the individual members of which produce and market milk in the Massachusetts-Rhode Island marketing area subject to the Order of the Secretary of Agriculture, 7 C.F.R. 1001 (hereinafter called the "Order"). The plaintiffs herein seek, by preliminary injunction and permanent order, to enjoin the enforcement of that Order in regard to "nearby differential" payments or during the pendency of the action to require that "nearby differential" payments determined pursuant to said Order be collected, placed and retained in a special escrow account of this Court, which payments otherwise would be paid over to those entitled thereto including members of the applicants.

Applicant New England Milk Producers' Association is a cooperative association of milk producers organized under the laws of the Commonwealth of Massachusetts and having its principal place of business in Boston. It has a membership of approximately 6,000 milk producers whose farms are located in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York. Approximately 85 percent of the milk produced and sold by said members is marketed in the Massachusetts-Rhode Island marketing area covered by said Order. A substantial number of the members of said association whose milk is marketed in the Massachusetts-Rhode Island marketing areas have their farms located in the so-called "nearby differential" area and receive the "nearby differential" payments provided by said Order which payments the plaintiffs seek to enjoin or require payment into a special escrow account.

Applicant Connecticut Milk Producers Association is a cooperative association organized under the laws of the State of Connecticut and has its principal place of business in Newington, Connecticut. The association has a membership of approximately 1,400 milk producers. Certain of its members market in the Massachusetts-Rhode Island Marketing Area and some of those members have their farms within the so-called "nearby differential" area for the Massachusetts-Rhode Island

Marketing Area. Practically all of the members of said association have their farms within the "nearby differential" area for the Connecticut Marketing Area covered by the Milk Marketing Order No. 15 of the Secretary of Agriculture (7 C.F.R. 1015).

Applicant Local Dairymen's Cooperative Association, Inc. is a cooperative association of milk producers organized under the laws of the State of Rhode Island with its place of business in Providence, Rhode Island. It has a membership of approximately 600 members located in the state of Massachusetts, Connecticut and Rhode Island. Virtually all of the milk of its members is marketed in the Massachusetts-Rhode Island Marketing Area and all the members of the said association have their farms in the so-called "nearby differential" area for that market.

Applicant Producers Dairy Company has a membership of approximately 35 producers, all of whom have their farms located within the Commonwealth of Massachusetts. The members market their milk in the Massachusetts-Rhode Island Marketing Area, and all of their farms are located within the so-called "nearby differential" area.

Applicant Massachusetts Cooperative Milk Producers Federation, Inc. is a corporation organized under the laws of the Commonwealth of Massachusetts with its principal place of business in Deerfield, Massachusetts. It has approximately 180 producer-members, almost all of which have their farms located in the Commonwealth of Massachusetts. Two-thirds of the milk produced by these members is marketed in the Massachusetts-Rhode Island area. Nearly all of the farms are located in the "nearby differential" area for that market.

Applicant Modern Milk Marketing Association is a nonstock cooperative corporation organized under the laws of the State of Connecticut with its principal place of business located in Cheshire, Connecticut. It has approximately 220 members whose farms are located in Connecticut and New York. Some of their milk is marketed in the Massachusetts-Rhode Island Marketing Area and some farms are located within the "near-

by differential" area for that market. Most of the farms are located within the "nearby differential" area for the Connecticut market which is subject to Milk Marketing Order No. 15 of the Secretary of Agriculture (7 C.F.R. 1015).

The intervention by the various applicants and their position in support of the Order of the Secretary of Agriculture have been approved by their respective Boards of Directors.

The applicants seek intervention of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The members of the applicants' cooperative associations have a direct, immediate and real economic interest in this action. The issuance of a preliminary injunction, any withholding of "nearby differential" payments in escrow, and any permanent injunction against enforcement of said Order would seriously disrupt the Massachusetts-Rhode Island Marketing Area and would deprive many members of the applicants of "nearby differential" payments either temporarily or permanently.

No other party has such an immediate and direct economic stake in this action. Accordingly, the applicants are so situated that the disposition of the action in a real and practical manner will impair or impede their ability to protect their interests. Since the applicants' interest in this action is immediate and direct, and no other party is so situated, their interest cannot be adequately represented by the other parties hereto.

In any event permissive intervention pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure is clearly appropriate. Applicants' support of the Order of the Secretary of Agriculture for the Massachusetts-Rhode Island Marketing Area, set out in its Memorandum of Points and Authorities in Opposition to the Motion for Preliminary Injunction, and supporting affidavit thereto, raises questions of law and fact which are common to the pending litigation. By permitting intervention, multiplicity of suits may be avoided which otherwise might arise as a result of any change in, or injunction against, enforcement of the said Order of the Secretary of Agriculture.

The plaintiffs' Motion for Preliminary Injunction has been set down for hearing on Wednesday, January 11, 1967, at 1:45 P.M. In view of the immediate pendency of the hearing on this motion and the applicants' position as parties with an immediate, direct and real economic stake in the outcome of the motion, the petitioners request either (1) that its motion to intervene be heard at the same time, or (2) the hearing on the Motion for Preliminary Injunction be postponed and continued until applicants' Motion to Intervene is heard.

The time limits of the pending hearing on the Motion for Preliminary Injunction do not permit filing of an answer to plaintiffs' Complaint herewith. However, the applicants will file an answer to the plaintiffs' Complaint as promptly as possible and in any event prior to the expiration of the time provided in the applicable rules or extension thereof.

WHEREFORE, the applicants pray that this Court:

(1) hear their Motion to Intervene prior to hearing the plaintiffs' Motion for Preliminary Injunction;

(2) grant the motion for intervention;

(3) permit applicants to file a Memorandum of Points and Authorities in Opposition to the Plaintiffs' Motion for Preliminary Injunction before the hearing on said Motion;

(4) afford applicants a full opportunity to participate in the oral argument of the plaintiffs' Motion for Preliminary Injunction; and

(5) such other relief as may be appropriate in the premises.

Respectfully submitted,

/s/ Lawrence D. Hollman

/s/ Carlyle C. Ring, Jr.

Attorneys for the Applicants

Klagsbrunn & Hanes
1200 - 18th Street, N.W.
Washington, D.C. 20036

Of Counsel:

Reuben Hall
75 Federal Street
Boston, Massachusetts

January 5, 1967

[Filed January 11, 1967]

[Caption Omitted in Printing]

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Comes now defendant by his attorney, the United States Attorney for the District of Columbia, and opposes plaintiffs' motion for preliminary injunction on the following grounds:

1. Adverse effect to public interest and injury to other producers outweigh *de minimis* injury to individual plaintiffs, who do not truly represent the class.
2. Plaintiffs have made no strong showing of the likelihood that they will prevail on the merits.

Incorporated herein (by reference) are the following exhibits, which were filed on defendant's behalf at the hearing of January 9, 1967 on plaintiffs' motion for temporary restraining order:

Gov't Ex. No.	*Description*
1	Affidavit of Herbert L. Forest, Director, Dairy Division, U.S. Department of Agriculture, executed January 9, 1967
2	Affidavit of Reuben Hall, General Counsel, New England Milk Producers Association, executed January 6, 1967

In support hereof, defendant submits a Memorandum of Points and Authorities.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

Affidavit of Reuben Hall in Opposition to Plaintiffs' Motion for Temporary Injunction

[Filed January 19, 1967]

I, Reuben Hall, first being duly sworn on oath, depose and say that he is a resident of Newton, County of Middlesex, Commonwealth of Massachusetts, and has been duly admitted as a member of the Bar of the Commonwealth of Massachusetts.

That he is General Counsel for New England Milk Producers' Association, an intervener in the above-entitled action, and has served in that capacity for more than forty years, and as such he is familiar with the operations and policies of said Association.

That he has participated in Administrative hearings before State and Federal Agencies in matters concerning the regulation of the marketing of milk by milk producers in various New England markets.

That he has participated in Administrative hearings conducted by the Secretary of Agriculture respecting the terms and conditions of Orders to be issued by the Secretary regulating the marketing of milk in the Massachusetts-Rhode Island market, the present regulation being Order #1 (7 CFR 1001).

That he has participated in the Administrative hearings relating to the Orders issued by the Secretary of Agriculture regulating the marketing of milk in each of the New England markets since the enactment of the Agricultural Adjustment Act in 1933.

For many years prior to the enactment of the Agricultural Adjustment Act of 1933 and the issuance of the license regulating the marketing of milk in the Greater Boston, Massachusetts market effective as of November 3, 1933, there had been in effect in the Greater Boston market a differential paid to "Nearby Producers" as a

result of negotiations between the milk handlers to whom such milk was sold, and the cooperative association of which these producers were members.

That the license issued by the Secretary of Agriculture under the Agricultural Adjustment Act regulating the marketing of milk in the Greater Boston market which became effective November 3, 1933, continued the existing trade practice of paying to nearby producers a differential other than the differential represented by a difference in transportation costs and direct delivery from farm to handler's plant in the market.

When the license was declared invalid by the United States District Court for the District of Massachusetts and the Agricultural Adjustment Act provisions, in so far as they purported to authorize the issuance of licenses by the Secretary of Agriculture regulating the marketing of milk, were declared to be unconstitutional, the Agricultural Adjustment Act was amended in 1935 to provide for the issuance of Orders regulating the marketing of milk by the Secretary of Agriculture.

The form of the 1935 enactment is basically the same as the form in which the reenactment and amendment of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq) were adopted.

Under the provisions of the 1935 revision of the Agricultural Adjustment Act, an Order was issued by the Secretary of Agriculture regulating the marketing of milk in the Greater Boston market area, said Order being called Order #4, which Order was involved in the case of H. P. Hood & Sons vs. United States 307 U.S. 588 and in the Green Valley Creamery Inc. vs. United States 108 F2d 342 (CA 1 1939).

In Order #4 there were contained provisions for nearby differentials. Subsequent to 1939, other Orders were issued regulating the marketing of milk in markets other than

the Greater Boston market, namely, Lowell-Lawrence later known as Merrimack Valley; Worcester, Massachusetts; Greater Springfield, Massachusetts; Southeastern New England; each of which contained provisions for the payment of nearby differentials. All of said Orders were merged and combined into one Order presently known as the Massachusetts-Rhode Island Milk Marketing Order #1, and is the Order involved in this litigation.

At the time of the amendment of the Agricultural Adjustment Act of 1935, it was the intent of the draftsmen of that Act, of whom your affiant was one, that the existing trade practices which had been in effect for a number of years prior thereto should be continued and not be disturbed, and it was on this basis with this thought in mind that the Act provided for an adjustment for volume, marketing, and production differentials customarily applied by handlers subject to such Order.

Order #4 regulating the marketing of milk in the Greater Boston, Massachusetts market was issued in 1936 and was in effect at the time of the reenactment of the Agricultural Marketing Agreement Act of 1937. Said Order #4, as above stated, had the provision for differentials in favor of nearby producers.

Section 4 of the Agricultural Marketing Agreement Act of 1937 specifically ratified, legalized and confirmed the marketing agreements, licensing, orders, regulations, provisions, and acts which had been executed, issued, approved or done under the Agricultural Adjustment Act or any amendment thereof by the Secretary of Agriculture.

The practice of paying nearby producers a differential has been in effect in the Boston and other New England markets for more than forty years either as a result of negotiations between producers and their cooperative associations and the handlers, or through the medium of provisions in the licenses and orders issued by the Secretary of

Agriculture under the Agricultural Adjustment Act as it was amended from time to time and reenacted by the Agricultural Marketing Agreement Act of 1937.

It was on the basis of these provisions for nearby differentials that the producers whose approval of such orders was a necessary prerequisite to their being made effective, did express their approval. Except as from time to time there may have been proposals as to the revision of the amount of these nearby differentials, considered at Administrative hearings, there has been no challenge of the validity of these provisions since the decision of the Court of Appeals for the First Circuit in Green Valley Dairy, Inc. v. United States 108 F2d 342.

The Secretary and producers both within and without the nearby differential zones have accepted the propriety of the now contested provisions of Order #1 and have acted in full reliance thereon.

Far from constituting any trade barriers as alleged by the Complaint, it might be pointed out that the plaintiffs in this action prior to ten years ago did not market their milk in any of the New England markets and it is only in the last ten years that their milk has been so marketed. That, as these producers are presently located, they have an election as to whether their milk shall be marketed in the New England markets or in the New York markets. The return to the plaintiffs on the milk marketed in the Massachusetts-Rhode Island market with the nearby differentials taken into account, is in excess of the returns which they would receive if they marketed their milk in the New York market.

The number of producers in the nearby differential zones is and has for several years been declining. The percentage of milk furnished by producers in the nearby differential zones of the total requirements of the marketing area, as defined in the Order, has also been declining.

The area from which milk is drawn to furnish the milk required for the marketing area comprehended by Order #1 has been expanding, all of which refutes the allegation that the nearby differential constitutes a trade barrier.

According to information published by the United States Department of Agriculture in a Bulletin revised as of August 1966 entitled "Farm Costs and Returns", commercial farms by type, size and location, "Economic Research Bulletin", Agricultural Information Bulletin #230, the average dairy farm in the Central Northeast including New England, in 1955 had a capital investment of $47,900.; total cash receipts in 1965 $15,051., of which $13,302. were cash receipts from dairying. Total cash disbursements $12,089. Total operating expense $11,811. leaving a net farm income for 1965 $4,271. before any charge for interest on capital. If charge for interest on capital, at current rate is taken into account, this would be $2,754. leaving a labor return for the dairy farmer $1,517. The average production per cow on an annual basis was 9550 lbs. and the average farm had 34 head of dairy cattle, which would make an annual production per farm 324,700 lbs. At 46¢ cwt. which represents the nearby differential in the first zone, this would amount to $1,493.62. If this amount were withheld from the producer in the nearby zone, pending the determination of this action, it would eliminate virtually the entire labor income of the producer. During that period, it would impose serious and substantial economic hardship and would accelerate the rate at which producers in the nearby differential zone would go out of business. It would disturb the existing stable market conditions. It would cause the producers in these areas to seek alternate markets where they might have an opportunity of getting better returns than they would otherwise receive if they were deprived of these nearby differentials. It would create supply problems for the handlers, particularly the small handler in the area and because of the

problems involved in locating new supplies, small handlers would be forced out of business.

Another consequence would be to disrupt the program of the Secretary of Agriculture to encourage additional milk production to meet the needs of the Nation for milk and other dairy products.

The participation of the interveners in these proceedings has been authorized by their respective Board (sic) of Directors.

REUBEN HALL
Reuben Hall

Subscribed and sworn to before me this Sixth day of January, 1967.

JOHN J. MURPHY
Notary Public

My commission expires September 24, 1971.

[Filed January 9, 1967]

Affidavit

DISTRICT OF COLUMBIA, SS.

Herbert L. Forest, being duly sworn deposes and says:

The statements in this affidavit are based upon my personal knowledge or upon records and publications of the United States Department of Agriculture, and upon information made available to me from records of the Market Administrator of the Massachusetts-Rhode Island Federal Milk Order 1.

1. I am the Director of the Dairy Division within the United States Department of Agriculture, and have been, since May 1954, responsible for the formulation and administration of the milk market order programs. I graduated from the University of Massachusetts and did grad-

uate work in Economics at Harvard University. I joined the staff of the United States Department of Agriculture in 1934 for work on the milk market order program and have been with the Department continuously from that date working in intimate, and, for the most part, continuous association with the development and administration of Federal Milk Orders. Since 1945, I have had increasing responsibility for the formulation, supervision, and administration of all milk marketing orders, including the Massachusetts-Rhode Island Order.

Significance of Farm Location Differential Payments

Prior to the advent of the federal regulatory program for milk, handlers in the New England milk markets historically paid more for milk produced on farms closest to the heavily populated areas than they did for milk produced at more distant locations. This additional value for milk produced nearest the market was more than was represented by just the advantage in the costs of transportation involved. With the advent of the federal milk order program under the Agricultural Adjustment Act of 1933, its amendments, and the re-enactment of certain provisions thereof as the Agricultural Marketing Agreement Act of 1937, the federal milk orders in New England provided for adjustments to the basic uniform minimum price structure established by such orders. The authority to make these adjustments was contained in the original act, and the provisions thereof were re-enacted without change in the Agricultural Marketing Agreement Act of 1937. Specifically, the Secretary is authorized to make adjustments to the uniform prices under milk orders to account for "(a) volume, market, and production differentials customarily applied by the handlers subject to such order, . . .(c) the locations at which delivery of such milk is made . . .". (7 U.S.C. 608c(5)(B)(ii)).

The original Boston Order of February 9, 1936, provided for differential payments to be made to producers

based upon the location of their farms in relation to the State House in Boston. This was done to reflect in the pricing structure of the order the historical price relationships by location which prevailed in the market. The validity of the farm location differential payments in the Boston Order was before the First Circuit Court of Appeals in *Green Valley Creamery, Inc.* v. *United States* (C.C.A. 1, 108 Fed. 2d, 342, December 15, 1939). The opinion of the First Circuit Court in that case affirmed the Secretary's interpretation of his authority to include this type of an adjustment to preserve the "status quo" of the prevailing marketing relationships. Provision for identical "nearby" differential payments has been included in the Boston Order since its inception in 1936.

Subsequent to the First Circuit Court's opinion in the *Green Valley Case* confirming the Secretary's interpretation of his authority to provide for this kind of "nearby" differential adjustment in milk orders, similar provisions were included in several federal milk orders covering marketing areas in the New England states. In the promulgation proceedings under the statute relating to the several New England orders the Secretary found in each instance that, historically, as aforesaid, milk produced nearest the heavily populated markets had a greater value than milk produced at more distant locations.

Producers in the Massachusetts-Rhode Island market have favored the "nearby" differential payments continuously since the beginning of the federal milk order program. The statute requires at least two-thirds approval by producers voting in referendum for any order or amendments to be effective. Fewer than 25 per cent of producers in the Massachusetts-Rhode Island market receive these payments, yet far more than that number have approved these payments even though they themselves do not receive them. This is significant, because it indicates the broad acceptance among producers that these are proper

payments and are effective provisions in the marketing orders which are designed to protect their interests.

In 1964, the Boston Order and several of the other New England orders containing identical "nearby" differential payment provisions were merged into one order. This order, called the Massachusetts-Rhode Island Order (7 CFR Part 1001), continues the "nearby" differential payments to producers at rates of 46¢ and 23¢ depending on the location of the producer's farm (Section 1001.72). In his decision relative to the merging of the several New England orders into the Massachusetts-Rhode Island Order in 1964, the Secretary specifically found that "nearby" differentials had been in effect under the several New England orders since their inception. He also found "The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets." (29 F.R. 1123).

Throughout the years the producers in New England have increased deliveries of their milk to handlers in bulk tank trucks. A bulk tank truck is a very large mobile over-the-road tanker which receives milk directly from a producer's holding tank on the farm. Usually, one tank truck picks up milk from many producers daily on a regular route. Each producer's milk is commingled with every other producer's milk in the tank. The bulk tank truck serves essentially the same function that was formerly performed by handlers' country receiving plants. For all practical purposes a handler takes delivery of a producer's milk on the farm when it is received in his bulk tank truck. In September 1966, the most recent month for which such information is available, 97 per cent of all milk produced for the Massachusetts-Rhode Island market was delivered by producers to handlers who picked it up in bulk tank trucks on the farms.

For over 30 years the "nearby" differential payments in milk orders have constituted an integral and important

part of the regulatory program for milk in New England. They have been and are one of the principal adjustments to basic uniform minimum pricing formulas providing for orderly marketing of milk. This type of adjustment is favored by the producer cooperatives in New England. It is significant that the "nearby" differentials in New England orders have not been challenged in litigation since the decision in the *Green Valley* case, *supra,* in 1939. Any sudden upset of the long-standing economic balance in marketing relationships which depend on the "nearby" differentials would result in chaotic marketing conditions.

Nearby Producers Will Suffer Irreparable Injury by a Temporary Withholding of the "Nearby" Differential Payments.

Data provided from the records of the Market Administrator of the Massachusetts-Rhode Island Order are appended in a table as Appendix "A". These data cover the most recent 12-month period for which current information is available; *i.e.,* December 1965 through November 1966. The table shows the total volume of production and the total number of producers in the entire area by month, the number of producers whose farms are located in the area covered by the 46¢ per cwt. "nearby" differential, together with the volumes of their production, the number of producers whose farms are located in the area covered by the 23¢ per cwt. "nearby" differential, together with the volumes of their production, and the amounts of payments to producers in each of the "nearby" differential areas. This table shows that in the last 12 months an average of 2,287 producers received "nearby" differential payments each month. Of these by far the greater number, 2,181, were located in the 46¢ "nearby" differential area. The average total number of producers supplying the market each month was 8,841. Thus, approximately 24½ per cent of the producers in the market

received "nearby" differential payments at the 46¢ per cwt. rate while only slightly more than 1 per cent received payments at the 23¢ per cwt. rate. Approximately 27 per cent of all the milk produced in the entire Massachusetts-Rhode Island marketing area is covered by "nearby" differential payments. It is expected that this situtation (sic) will not materially change in the foreseeable future.

It is evident that substantial volumes of production and large numbers of producers have been and are affected by "nearby" differential payments on their milk. The economic impact of this price adjustment throughout the years is reflected over the entire area in concommitant (sic) adjustments in land values of the affected producers, investments in facilities, size of dairy herds, and rates of payment for farm labor. The sudden cutting off or withholding of these payments, representing as they do such a substantial part of the affected producers immediate return for milk, would cause all of them severe hardship and many of them irreparable damage. Their working capital position would be seriously impaired. Farmers need to turn over their working capital rapidly because much of it is used to buy feed, particularly in these winter months when natural pasture is practically nonexistent. The milk order particularly provides for rapid payment by handlers to farmers by requiring a first or immediate initial payment within 5 days after the end of the month, with final payment to follow within 15 days (Section 1001.70). Timely payment of all money to producers is imperative.

During the last twelve months, on an average, producers in the 46¢ "nearby" differential area received approximately $148 per month in "nearby" differential payments. This constituted approximately 7.8 per cent of the average total monthly returns of these producers. 24½ per cent of the producers in the entire market received payments at this highest rate.

As recently as March 31 of last year the Secretary of Agriculture held extensive emergency public hearings on proposed amendments to the pricing provisions of all milk marketing orders. He found that declining milk production in the United States had reached a critical stage and was trending downward rapidly. In order to ameliorate this condition, general increases in basic prices were made effective on an emergency basis. The increase in the level of the Class I price made effective in the Massachusetts-Rhode Island Order was 22¢ per cwt. Translating this immediate Class I price increase into the uniform or blend price in the market resulted in an approximate 13¢ over-all increase in producers returns, generally. After most careful consideration of all of the facts involved, it was considered that this amount of price increase on an emergency basis would arrest the decline in milk production and bring about the necessary corrections to meet the situation. If the 46¢ or 23¢ per cwt. "nearby" differential payments were suddenly to be withheld from the 2,287 "nearby" producers in the Massachusetts-Rhode Island area who are receiving these payments, it is obvious that the recent emergency corrective action taken by the Department of Agriculture would be entirely undone. The effect on the "nearby" producers would be immediate and drastic.

From my intimate knowledge of the milk industry in New England, I believe that it is so marginal in today's economy that many farmers in the area could not and would not continue in production if they did not promptly receive the accustomed "nearby" differential payments. This is particularly true if a situation were created now whereby the payments were withheld with the possibility that they would not be received in the future. In this situation many of the "nearby" producers would just quit production altogether.

Producers Who Do Not Receive "Nearby" Differentials Will Not Be Irreparably Injured Unless Such Payments Are Presently Withheld.

The effect of withholding the "nearby" differentials from producers who count on them would be to disrupt the status quo which has existed for many years. It would not perserve the present position of the "outside" producers who do not receive them. In the event that the plaintiffs in this action ultimately prevail, the most that they would receive is a windfall in the basic blend price which they receive.

Computations based on the average blend price for milk paid in the Massachusetts-Rhode Island market during the preceding 12 months, together with the amount paid as "nearby" differentials, discloses that if there had been no provision for "nearby" differential payments in the order the blend price in the area would have been increased by approximately 12¢ per cwt. Producers receiving the "nearby" differentials would have had their returns reduced by 34¢ and 11¢ per cwt., respectively. Approximately 98 per cent of the "nearby" producers would have had their returns reduced by 34¢ per cwt. Thus, the adverse effect on the 2,181 "nearby" producers in the 46¢ area would have been 3 times as great as the gain to the "outside" producers. In the present circumstances, if "nearby" differentials are temporarily withheld no producers will receive the money involved for current operations.

If the "nearby" producers do not continue to receive these "nearby" differentials now, they will be irreparably injured for the reasons I have previously stated. No payment to them at a future date would bring lost production into being or restore the damage done to them and to the market which they supply. Continuing the payments will have no present effect on "outside" producers. Any possible ultimate gain to "outside" pro-

ducers, should they eventually prevail, would be *de minimus* when compared with the immediate and irreparable damage that would result to the "nearby" producers and the market if the "nearby" differentials were to be withheld.

The Public Interest Would Be Adversely Effected by Temporary Withholding of "Nearby" Differentials to Producers.

The express purpose of the Agricultural Marketing Agreement Act of 1937 is to promote and maintain orderly marketing conditions, avoid unreasonable fluctuations in supplies and prices and insure a sufficient supply of pure and wholesome milk. The accomplishment of this objective requires a most careful balancing of the many economic factors dealing with production, supply, pricing, and marketing relationships. I have previously stated that the temporary disruption of one of these economic balance factors, the non-payment of "nearby" differentials, would have a most serious and immediate adverse effect on a large segment of producers supplying the Massachusetts-Rhode Island market. If this disruption were to occur, the public interest would also be most seriously injured.

The Massachusetts-Rhode Island Order price structure is carefully aligned to prices in adjacent markets. The adjacent Connecticut marketing order also presently provides for "nearby" differentials. All producers located in Connecticut are eligible to receive "nearby" differentials at the 46¢ rate under either the Massachusetts-Rhode Island or the Connecticut Order. Approximately 256 producers presently supplying the Massachusetts-Rhode Island market are located in Connecticut. During the last 12-month period the blend price in the Connecticut market has been, on an average, 8¢ above the Massachusetts-Rhode Island blend price. To suddenly withhold the "nearby" differential payments in the Massachusetts-Rhode Island market would, with respect to these 256 producers, create an

immediate price disparity of 54¢ per cwt. These producers would undoubtedly all shift their milk into the Connecticut market immediately. Particularly, in the face of the possibility that they might not receive them at all. Over the last 12-month period these 256 producers shipped a total of 127,206,000 pounds of milk into the Massachusetts-Rhode Island market. This extremely large shift of producers from the Massachusetts-Rhode Island market to the Connecticut market would seriously disrupt the available supplies of fluid milk into the Massachusetts-Rhode Island area, disrupt existing transportation facilities and create disorderly marketing conditions in the Connecticut market by the sudden dumping of large quantities of milk on that market. Additionally, the many handlers in the Massachusetts-Rhode Island market who depend on these particular producers for their supplies would be cut off from their dependable sources of supply, unless they pay premiums.

One of the principal objectives of the Federal milk marketing program is to provide for and maintain orderly markets in milk. Based on my experience, I believe that the withholding of the "nearby" differentials in the Massachusetts-Rhode Island market would bring about chaotic conditions in that market immediately. This one action would so misalign the existing price structure, injure producers, and so seriously disturb long-standing marketing relationships that permanent injury to milk supply for the consumers in the area would result. The public interest definitely would be seriously injured. Should it eventually be determined that "nearby" differentials should not be paid, then a completely new approach in an order to achieve orderly marketing in the area must be considered. In such an event, the interests of all segments of the market would have to be considered and weighed, including the public, handlers, the relationships affecting other and adjacent markets, as well as interests of producers. This

type of action can be properly undertaken only through the established statutory procedure of a public hearing on the full matter.

(s) HERBERT L. FOREST
Herbert L. Forest
Director, Dairy Division
Consumer and Marketing Service

Subscribed and sworn to before
me this 9th day of January, 1967.

s/ AGNES STASEK
Notary Public

My commission expires 2-1-67.

APPENDIX "A"

TABLE 1

Massachusetts — Rhode Island Order

Number of Producers, Volume of Production, and Amounts Paid re Farm Location Differential Areas

	46¢ Differential Area		23¢ Differential Area		Outside Differential Areas		Total All Areas Under Order		Amount of Differential Paym	
	Number of Producers	Pounds (thous.)	Number of Producers	Pounds (thous.)	Numbe- of Producers	Pounds (thous.)	Number of Producers	Pounds (thous.)	46¢ Area	23¢ Area
December 1965	2,265	70,550	100	2,844	6,812	185,623	9,177	259,017	$ 322,829.00	$ 6,649.21
January 1966	2,220	72,460	101	2,945	6,706	190,587	9,027	265,992	332,784.76	6,888.17
February	2,210	66,107	102	2,806	6,633	172,985	8,945	241,898	301,011.26	6,582.28
March	2,211	75,087	105	3,378	6,628	205,802	8,944	284,267	342,811.24	7,943.12
April	2,202	75,362	106	3,507	6,630	213,358	8,938	292,227	344,700.90	8,228.01
May	2,196	79,427	108	3,772	6,577	227,447	8,881	310,646	362,895.66	8,824.04
June	2,209	74,373	107	3,627	6,522	227,181	8,838	305,181	339,678.48	8,515.08
July	2,158	68,463	110	3,217	6,517	196,482	8,785	268,162	314,126.60	7,400.10
August	2,162	68,413	104	3,038	6,450	182,426	8,716	253,877	312,244.01	6,987.55
September	2,129	65,537	104	2,921	6,457	179,617	8,690	248,075	297,660.44	6,756.94
October	2,112	67,198	108	3,108	6,423	179,276	8,643	249,582	306,776.78	7,203.68
November	2,102	64,149	111	3,149	6,293	166,668	8,506	233,966	293,346.29	7,318.10
2 Month Period	SA 2,181	847,126	SA 106	38,312	SA 6,554	2,327,452	SA 8,841	3,212,890	$3,870,865.42	$89,296.28

APPENDIX "A"

TABLE 1

Massachusetts — Rhode Island Order

Number of Producers, Volume of Production, and Amounts Paid re Farm Location Differential Areas

¢ Differential Area		23¢ Differential Area		Outside Differential Areas		Total All Areas Under Order		Amount of Differential Payments		
ber of ucers	Pounds (thous.)	Number of Producers	Pounds (thous.)	Numbe of Producers	Pounds (thous.)	Number of Producers	Pounds (thous.)	46¢ Area	23¢ Area	Total Area
65	70,550	100	2,844	6,812	185,623	9,177	259,017	$ 322,829.00	$ 6,649.21	$ 329,478.21
20	72,460	101	2,945	6,706	190,587	9,027	265,992	332,784.76	6,888.17	339,672.93
10	66,107	102	2,806	6,633	172,985	8,945	241,898	301,011.26	6,582.28	307,593.54
11	75,087	105	3,378	6,628	205,802	8,944	284,267	342,811.24	7,943.12	350,754.36
02	75,362	106	3,507	6,630	213,358	8,938	292,227	344,700.90	8,228.01	352,928.91
96	79,427	108	3,772	6,577	227,447	8,881	310,646	362,895.66	8,824.04	371,719.70
09	74,373	107	3,627	6,522	227,181	8,838	305,181	339,678.48	8,515.08	348,193.56
68	68,463	110	3,217	6,517	196,482	8,785	268,162	314,126.60	7,400.10	321,526.70
82	68,413	104	3,038	6,450	182,426	8,716	253,877	312,244.01	6,987.55	319,231.56
29	65,537	104	2,921	6,457	179,617	8,690	248,075	297,660.44	6,756.94	304,417.38
12	67,198	108	3,108	6,423	179,276	8,643	249,582	306,776.78	7,203.68	313,980.46
03	64,149	111	3,149	6,293	166,668	8,506	233,966	293,346.29	7,318.10	300,664.39
81	847,126	SA 106	38,312	SA 6,554	2,327,452	SA 8,841	3,212,890	$3,870,865.42	$89,296.28	$3,960,161.70

[Filed January 11, 1967]

[Caption Omitted in Printing]

DEFENDANT'S MOTION FOR ORDER CONSOLIDATING HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH HEARING ON MOTION(S) FOR SUMMARY JUDGMENT, AND FIXING EXPEDITED "TIMETABLE" SCHEDULE FOR CONSOLIDATED HEARING

Comes now defendant by his attorney, the United States Attorney for the District of Columbia, and moves the Court for an order:

(A) Consolidating the hearing on plaintiffs' motion for preliminary injunction with all motions for summary judgment which may be filed in this cause; and

(B) Fixing expedited "timetable" schedule for such consolidated hearing, as follows:

(i) Defendant shall file his motion for summary judgment on or before January 27, 1967;

(ii) If the Court grants leave to intervene, intervenors shall, if they desire to do so, file their motion(s) for summary judgment on or before January 27, 1967;

(iii) Plaintiffs shall, if they desire to do so, file their motion(s) for summary judgment on or before February 3, 1967; and

(iv) Consolidated hearing on all such motions shall be on February 8, 1967.

In support hereof, defendant submits a Memorandum of Points and Authorities.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS]

[January 11, 1967]

[3] THE COURT: Good afternoon, gentlemen.

MR. HOLLMAN: If the court please, I have one preliminary matter I would like to raise.

THE COURT: Very well.

MR. HOLLMAN: I would like to move at this time for the admission of Reuben Hall to the Bar of this Court for the special purpose of this cause. Mr. Hall is a Member of the Bar of the Supreme Court, Judicial Court of the Commonwealth of Massachusetts in good standing and he has been a Member of that Bar for forty years.

THE COURT: Do you want Mr. Hall to argue this Motion for Intervention?

MR. HOLLMAN: Yes, Ma'am. He will be arguing the Motion to Intervene and, if granted in opposition to the Motion for Preliminary Injunction.

* * *

[90] [The Court:] * * * You have made a motion that this be advanced under this Rule 65?

MR. ZIMMERMAN: Yes.

THE COURT: Would you like to have it advanced just for trial?

MR. ZIMMERMAN: We would like to have that timetable schedule observed in any event Your Honor—as looking to the disposition of the summary judgment—yes, Your Honor.

We think that we should like Your Honor to approve that order, even though Your Honor does not include with it the postponement of the ruling on the preliminary injunction.

THE COURT: Do you want to say anything about any consideration the Court might give to advancing this case?

MR. RYAN: Yes, Your Honor.

I would like to say this: That the resources of the government are considerable here. These plaintiffs, of course, do not have available those resources and I have had to put in a great amount of time in this case [91] and I have not seen a

lot of the material here because it is only available from the Agricultural Department.

Not only that, but I am served with this motion as I walk in here—I have never seen it before and I don't even know what is in it.

I will say this: I will attempt to expedite the hearing but not to the degree of injustice to my clients.

THE COURT: I will pass upon that point a little later—about whether or not I will advance the case for trial.

MR. ZIMMERMAN: What is Your Honor's pleasure as to a fixed date by which they must file an answer if you expedite it—I would like to have that clear.

THE COURT: Well there are rules for answering things.

MR. ZIMMERMAN: It could be expedited, Your Honor.

THE COURT: Yes, it can be, but I think you all have your hands full in preparing these papers now following the ruling I have made. I will be here for quite a little while.

MR. ZIMMERMAN: Is Your Honor stating—I think they have usually five days within which to respond to that motion and then Your Honor will rule—is that what Your [92] Honor is now telling me?

THE COURT: Yes, they will have the regular time to answer and when the answer is filed, why then the matter can proceed. Of course, your motion is really in a sense a combining motion—for combining the preliminary injunction with the final hearing.

MR. ZIMMERMAN: I will if I may now amend it—In answer to your inquiry of me, Your Honor, as Your Honor has not seen fit to combine the two, may it nonetheless be considered as a motion to expedite?

THE COURT: Well I thought that maybe you both might want some date set for a hearing, but since apparently Mr. Ryan feels like he needs a little more time—at least time to read the motion—

MR. ZIMMERMAN: Yes.

THE COURT: He may have that time.

MR. ZIMMERMAN: In this regard, does Your Honor wish to set it down for some specific date after that date?

THE COURT: No. The Motions Clerk here will have to fix up the date. I have things on the calendar for days in advance–in fact into February–and I don't know what date she will have when I can hear you.

[93] MR. ZIMMERMAN: I am merely suggesting, Your Honor, that we would like to leave with the Court the request that to the extent that Your Honor is able to give it prompt consideration, we would waive a hearing if Your Honor could even rule upon the papers–if Mr. Ryan would be willing to waive a hearing–and maybe we could get get an earlier disposition of this matter.

THE COURT: Do you have any comments on Bond, Mr. Ryan? What kind of Bond?

* * *

AFFIDAVIT OF HERMAN L. SPARROW (Designated by Respondents, One of Eighteen Affidavits by Nearby Farmers Filed on January 11, 1967.)

Northboro, Massachusetts
January 9, 1967

I, Herman L. Sparrow, have for fourteen years owned and operated a dairy farm in the town of Northboro, Worcester County, Massachusetts, which has been in my family since 1900 and on which I produced 1,118,967 pounds of milk during 1966 which was sold to a handler regulated under the Massachusetts-Rhode Island federal milk order. My income from the farm operation for this year was about $74,000 and my expenses for the year amounted to about $72,100 without allowing for any return on approximately $27,000 of new capital invested in the business. Net return for my labor and management above expenses was therefore $1,900 and allowance for five per cent return on capital invested would reduce this figure to $550. Without the $.46 per hundredweight differential payment I now receive, my gross income would have been $5,147.40 less in 1966 and I would have begun to seri-

ously consider disposing of my property for a housing development. I just completed construction of a milking parlor for 100 head, the $17,000 investment for which was financed with the full expectancy of continued income from milk production in 1967 at prices like those in 1966. Faced with a sure increase of $1,400 in real estate property taxes, failure to receive the $.46 differential payment on an estimated 100,000 pounds per month in 1967 would at least cause me to advise my sons to forget about higher education in agriculture. Prices under federal order in Massachusetts have been low enough even including the differential payment, and I will strongly oppose any federal order for this area that does not make provision for it.

/s/ Herman L. Sparrow

[Jurat Omitted in Printing]

Order Denying Applicants' Motion for Intervention

[Filed January 16, 1967]

Upon consideration of the applicants' motion for intervention as defendants herein and the plaintiffs' Opposition thereto, as well as the affidavits, exhibits, and points and authorities filed herein and after hearing argument of counsel in open court, and it appearing to the Court therefrom that the applicants for intervention have not filed the necessary pleading with their said motion as required under Rule 24(c), that the applicants have no interest in the subject of this action as required under Rule 24, and that the defendant is adequately representing the validity of the regulation challenged herein and the interests of those milk producers who would be adversely affected by an invalidation of such regulation, and it further appearing to the Court that the plaintiffs have filed this action as a class action for themselves, individually, and for all other similarly situated non-nearby milk producers,

and that plaintiffs propose to fairly and adequately protect said class, it is by the Court this 16th day of January 1967,

ORDERED that the motion of applicants, New England Milk Producers Association, et al., for leave to intervene as defendants in this action be and the same hereby is denied.

BURNITA SHELTON MATTHEWS
Judge

Preliminary Injunction

[Entered January 16 1967]

This cause came on for hearing on the Motion for Preliminary Injunction filed herein by plaintiffs and the Opposition thereto filed by defendant, and the Court having considered the verified complaint, affidavits and other exhibits and the points and authorities filed herein, and having heard argument of counsel for each party, the Court makes the following

FINDINGS OF FACT

1. Plaintiffs are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They bring this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk order, which was promulgated by defendant effective October 1, 1964, and is still in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision, and a preliminary injunction during the pendency of the action with escrow-

ing of the sums constituting the nearby farm location differential payments made under said milk order provision, 7 C.F.R. 1001.72.

2. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located.

3. The nearby farm location differentials are deducted from the equalization pool proceeds belonging in equity to all producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed. Register 5590, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

4. This action by plaintiffs has been brought as a class action, that is as an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and sell their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby differential, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producers as a whole. The plaintiffs and their class constitute approximately 6,600 of the 8,800 milk producers whose milk is produced and sold under said

order and whose farms are so located as to be ineligible for said nearby differential provision.

5. The plaintiffs and their class are required by the operation and provisions of said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

6. There is no way that said nearby differential payments may be recovered from nearby milk producers by plaintiffs and their class once such payments are made, in that the involved producers number approximately 8,800 and are located in many different jurisdictions in various New England and other states, and such attempt at recovery would involve a multiplicity of parties and actions.

7. On November 18, 1966, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in the case of *Lorton Blair, et al.* v. *Orville Freeman, Secretary of Agriculture of the United States*, No. 19,801, in which it held that the nearby farm location differential of the New York-New Jersey milk marketing order, 7 C.F.R. 1001.71(b) is unauthorized and void, and granted a declaratory judgment to such effect and a permanent injunction against its continued enforcement by defendant. Said judgment was stayed for 90 days pending determination by defendant as to whether to appeal said decision. The sums constituting the nearby differential payments under the New York-New Jersey milk order have been ordered to be escrowed until final judgment is entered.

8. There is no substantial difference between the operation of the New York-New Jersey milk order nearby differential provision and that of the Massachusetts-Rhode Island milk order being contested herein. Both provide

for nearby payments from the equalization pool proceeds through reduction of the uniform blended price, and said differential payments reduce pro tanto the amount which plaintiffs and their class would otherwise receive for their milk each month under the respective milk orders.

Now, Therefore, the Court makes the following

CONCLUSIONS OF LAW

1. The plaintiffs and their class are entitled to the granting of the requested preliminary injunction during the pendency of this cause in order to preclude further irreparable injury to them, and they have no adequate remedy at law.

ORDER

Wherefore, it is by the Court this 16th day of January 1967,

Ordered, that defendant be and he hereby is restrained and enjoined during the pendency of this cause from making payment of the contested nearby differential payments, 7 C.F.R. 1001.72, to producers classified as nearby under the Massachusetts-Rhode Island milk marketing order, either directly or indirectly, or by or through his Market Administrator for said milk order or their agents, servants, attorneys or employees, or by or through any other persons in active concert or participation with them, and it is further

Ordered, that defendant take all necessary action to effectuate the required changes in the pertinent provisions of the Massachusetts-Rhode Island milk order to accomplish the foregoing, and it is further

Ordered, that defendant, his said Market Administrator, their agents, servants, attorneys and employees, and all

persons in active concert or participation with them, take all necessary action to collect, place and retain the sums constituting the nearby differential payments in a separate interest-bearing bank account or accounts in a bank or banks duly approved as a federal depository for such sums, said account to be in the name of defendant as trustee thereof and designated to reflect the true purpose thereof, or the same may be invested in short-term U. S. Government securities, and it is further

ORDERED, that defendant or his said Market Administrator shall keep such records as will disclose the amounts so set aside, the sums which otherwise would be payable to individual producers in the nearby differential areas, and the quantities of milk delivered in December 1966, and thereafter by each milk producer subject to pricing and pooling under said milk order, and it is further

ORDERED, that the said account, and all pertinent records and calculations identifying the source of the funds, the nearby producers, and the amounts to which they would have been entitled to under said milk order shall be retained by defendant, his Market Administrator and their agents, servants, attorneys and employees, except that defendant shall advise the Court and plaintiffs' attorney, Charles Patrick Ryan, 400 Prudential Building, Washington, D. C., 20005, by letter as to the total amount of each monthly deposits in all banks collectively, and total amounts invested in short-term U. S. Government securities and the date thereof, and it is further

ORDERED, that this order shall apply to the nearby differential payments applicable to milk delivered under said milk order in December 1966, and thereafter pending the further order of this Court or the pendency of this action, provided the plaintiffs or one of them furnish an undertaking in the amount of $250.00 with surety approved by the Court, for the payment of such costs and damages as

may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

BURNITA SHELTON MATTHEWS
Judge

[Filed January 27, 1967]

PRAECIPE

The Clerk of said Court will please withdraw Defendant's Motion for Order Consolidating Hearing on Plaintiff's Motion for Preliminary Injunction with Hearing on Motion(s) for Summary Judgment and Fixing Expedited "Timetable" Schedule for Consolidated Hearing, as orally amended.

[Subscription Omitted in Printing]

[Filed January 30, 1967]

[Caption omitted in printing.]

MOTION TO ADD PARTIES PLAINTIFF

Plaintiffs, Russell Allen, et al., hereby move the Court for an order allowing the addition of parties plaintiff to this action, and for grounds thereof they say as follows:

1. Plaintiffs bring this suit as a class action, but defendant questions the right to the maintainance thereof in view of the fact that the Complaint lists but 5 individual plaintiffs.

2. Plaintiffs do not believe that numbers of plaintiffs constitute the basis for a class action, but they propose to add the attached 163 additional names as plaintiffs to satisfy defendant's objections, baseless as they may be. Plaintiffs have an additional 150 plaintiffs available to be added to the Complaint if defendant still objects to the number thereof, and 1,000 can be added in a short time if required.

[Subscription Omitted in Printing]

Excerpts from Transcript of Hearing
January 31, 1967

* * *

[43] MR. GOLDBLOOM: To begin with, Your Honor, I don't know of any case that has arisen under a Milk Marketing Order of this variety which has been prosecuted as a class action and I want to make one thing clear right now.

THE COURT: Was the Blair case prosecuted as a class action?

MR. GOLDBLOOM: No Your Honor—it was not.

THE COURT: It wasn't?

MR. GOLDBLOOM: No, it was not prosecuted as a class action and nor was Stark v. Wickard and nor were any of the other cases. * * *

* * *

Order

[Filed February 1, 1967]

Upon consideration of the plaintiffs' motion for an order determining that this case is maintainable as a class action under Rule 23, FRCP, the affidavits, exhibits, and points and authorities filed herein, and after hearing argument of counsel for each party, the Court makes the following

FINDINGS OF FACT

1. Plaintiffs are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the federal milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They bring this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk order, which was promulgated by defendant effective October 1, 1964, and is still

in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision by the defendant.

2. On January 16, 1967, pursuant to the motion of the plaintiffs, this Court entered an order granting a preliminary injunction during the pendency of this action enjoining the defendant from paying over to the eligible class of milk producers the monies representing the contested nearby farm location differentials of said milk order, 7 C.F.R. 1001.72, and requiring that defendant collect, place and retain the monthly sums that would otherwise be paid under said order provision in an escrow fund during the pendency of this action or until further order of the Court.

3. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located. Those milk producers serving the market whose farms are not located in either of the two "nearby" designated areas do not receive the said farm location differential payment.

4. The nearby farm location differentials are deducted from the equalization pool proceeds belonging in equity to all producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed-

eral Register 5590, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

5. The plaintiffs and their class of ineligible milk producers constitute approximately 6,600 of the 8,800 milk producers serving the market, and they are required by the operation and provisions of said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

6. There is no way that said nearby differential payments may be recovered from nearby milk producers by plaintiffs and their class of ineligible milk producers once such payments are made, in that the involved producers number approximately 8,800 and are located in many different jurisdictions in various New England and other States, and such attempt at recovery would involve a multiplicity of parties and actions.

7. This action by plaintiffs has been brought as a class action, that is an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and sell their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby differential payments, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producers as a whole.

8. The plaintiffs' class of non-eligible milk producers are so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class,

and the claims of the representative parties are typical of the claims of the class. The Court finds that the present plaintiffs as representative parties will fairly and adequately protect the interests of their class of non-eligible milk producers, and that any judgment in this action shall include all of the non-eligible class of milk producers, that is those milk producers whose farms are so located as to make them ineligible for said nearby differential payments under said milk order, whether or not such judgment is favorable to plaintiffs' class of non-eligible milk producers.

Now, Therefore, the Court makes the following

CONCLUSIONS OF LAW

1. This suit may be maintained as a class action under Rule 23(a) and Rule 23(b)(2), FRCP, and the present plaintiffs are entitled to bring and maintain this action for themselves, individually, and as representatives of all of their class of milk producers similarly situated who produce and sell their milk in the market under the Massachusetts- Rhode Island federal milk marketing order, 7 C.F.R. 1001, and whose farms are so located as to make them ineligible for the nearby farm location differential payments under the provision promulgated by the defendant.

ORDER

Wherefore, it is by the Court this 1st day of February, 1967,

Ordered, that the motion of the plaintiffs for an order determining that the present suit is maintainable by them as a class action as representatives of their class of non-eligible milk producers be and the same hereby is granted.

(Signed) Burnita Shelton Matthews
Judge

Order

[Filed February 1, 1967]

Upon consideration of the motion of the plaintiffs to add parties plaintiff to this cause, and of the points and authorities filed in support thereof, it is by the Court this 15th day of February, 1967,

ORDERED, that the plaintiffs' motion to add parties plaintiff to this cause, consisting of the 163 names and addresses of dairy farmers who produce and market their milk under the Massachusetts-Rhode Island federal milk marketing order, 7 C. F. R. 1001, and whose farms are so located as to render them ineligible for the nearby farm location differential payments of said milk order, 7 C.F.R. 1001.72, which said list of names and addresses of such dairy farmers is attached to plaintiffs' motion filed herein, be and the same is hereby granted.

(Signed) BURNITA SHELTON MATTHEWS
Judge.

Plaintiffs' Motion for Summary Judgment

The plaintiffs, individually, and as representatives of all of their class of dairy farmers who produce and sell their milk under the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001, hereby respectfully move the Court, by their attorneys, for summary judgment pursuant to Rule 56, FRCP, upon the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law, and for grounds of this motion they allege as follows:

1. There is no genuine and true issue as to any material fact in this case. The complaint and facts set forth by plaintiffs have been verified by affidavit, the same being made part hereof, or have been taken from official decisions

or publications issued by defendant or his statutory agent, the Market Administrator for the Massachusetts-Rhode Island Federal milk order, 7 C.F.R. 1001.

2. The plaintiffs are entitled to a judgment as a matter of law for the relief prayed for in the complaint because:

(a) This is a familiar representative action in equity by dairy farmers to enjoin the Secretary of Agriculture from enforcing a provision of an administrative order which is illegal on its face and for declaratory relief, in which situation Federal Courts have previously entertained jurisdiction of the subject matter. The Complaint alleges that plaintiffs have a proprietary interest in a fund under the control of and administered by the defendant and from which he is making unlawful diversions, and that they also have certain rights by virtue of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 et seq., and the Order that are capable of judicial enforcement.

(b) The nearby farm location differential of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, is unauthorized and void under the statute, Agricultural Marketing Agreement Act of 1937, as amended, as being in excess of the powers conferred to the Secretary thereunder, and it illegally varies uniform milk prices which all dairy farmers are entitled under said Act to receive for their milk, in that such provision respects or relates to the uses of milk of producers instead of complying with the Act's purpose, policy and specific command that all dairy farmers are to receive a uniform price for their milk irrespective of the use thereof.

(c) The said order provision illegally and unconstitutionally discriminates against plaintiffs and their class by placing them in a category in which they are ineligible for such nearby differential and by the establishment of a preferred and favored class of producers to whom

preferential treatment is accorded by the deduction of such nearby differential payments from the milk producers' settlement fund or pool, belonging in equity to all producers, and the setting or paying over of those payments to the class of nearby producers.

(d) The defendant Secretary failed to make any valid finding in respect to the promulgation of the differential in his decision, and his conclusions were inconsistent, unreasonable and arbitrary, and the nearby differential is therefore illegal.

(e) And for the reasons set forth in the attached Points & Authorities and the brief in elaboration thereof.

CHARLES P. RYAN
400 Prudential Building
Washington, D. C. 20005
ST-3-0004
Attorney for Plaintiffs.

Plaintiffs' Exhibit "A"

MASSACHUSETTS-RHODE ISLAND MARKET
SOURCES OF MILK
DECEMBER 1965

	Producers	Producer Deliveries (1,000 Pounds)	Percent of Producer Deliveries
Connecticut	256	10,082	3.9
Maine	863	17,383	6.7
Massachusetts	1,532	46,039	17.8
New Hampshire	637	16,157	6.2
New York	980	34,207	13.2
Rhode Island	232	7,288	2.8
Vermont	4,677	127,861	49.4
Total	9,177	259,017	100.0

Plaintiffs' Statement of Material Facts as to Which There Is No Genuine Issue

1. Plaintiffs are dairy farmers whose farms are located in the State of Vermont. They sue individually and as representatives of all of their class of dairy farmers similarly situated in the States of Vermont, New Hampshire, Maine and other States whose milk is disposed of in the Massachusetts-Rhode Island Milk Marketing Area, being priced and pooled under the provisions of the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001, and whose farms are so located as to render them ineligible to receive the nearby farm location differentials of said milk order, 7 C.F.R. 1001.72.

2. The plaintiffs' complaint seeks a declaration of the invalidity of the said nearby differential provision of the Order and a permanent injunction against its continued enforcement, as well as injunctive relief and escrowing of monies constituting the contested nearby differential payments of the Order during the pendency of the action. Plaintiffs allege that such nearby differential is unauthorized and void under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 et seq., the law under which the defendant Secretary purports to have promulgated the same. Plaintiffs' complaint herein also alleges other grounds under which they maintain that the nearby differential provision of the Order is illegal and invalid.

3. Plaintiffs and their class are dairy farmers and milk producers as contemplated and defined in the Order and the Act.

4. The defendant is Orville Freeman, Secretary of Agriculture of the United States, who administers the milk order through his statutory agent, The Market Administrator for the Order, whose office is located in Boston, Massachusetts.

5. The Order was promulgated as aforesaid by the defendant Secretary effective October 1, 1964, after due

notice and hearing as provided for in the Act. The Order amended and consolidated under Part 1001, C.F.R., the order provisions regulating of milk in the Greater Boston, Southeastern New England (all of Rhode Island and a substantial part of southeastern Massachusetts), Worcester, and the Springfield marketing areas, and it redesignated the reconstituted area as the Massachusetts-Rhode Island marketing area. 29 Fed. Reg. 5583 (recommended decision); 29 Fed. Reg. 11205 (decision); 29 Fed. Reg. 12236 (order).

6. The Act establishes a regulatory plan under which the defendant Secretary is authorized to promulgate regional milk marketing orders. The basic function of these milk orders is to establish minimum prices for the classifications of milk utilization included in the orders, the different uses of milk having substantially differing monetary value by virtue of the Government administered regulation, and to require the payment of such uniform minimum prices by all handlers and the receipt of a uniform price by all producers, irrespective of the use made of their milk by the particular handler to whom it is delivered by them. (See *Blair* v. *Freeman*, No. 19801, Nov. 18, 1966; *H. P. Hood & Sons, Inc.* v. *U. S.*, 307 U.S. 588, 593-94; *Lehigh Valley Co-op., Inc.* v. *U. S.*, 370 U.S. 76.

7. The Order here involved classifies milk according to use or the form in which it is disposed of by handlers. 7 C.F.R. 1001. 47-51. Thus, milk used for drinking purposes or for fluid use is classified as Class I, and milk used or disposed of for other specified purposes is classified as Class II, such as that used for manufacturing ice cream, cheese, etc.

8. Each use classification is assigned a monetary value or minimum price which all handlers must pay, and such Class I and Class II minimum prices are computed from pricing formulas set forth in the Order. 7 C.F.R. 1001.60, 1001.61. Class I or milk for fluid use is assigned a much

higher price than that for Class II, primarily manufactured milk, and the latter is also referred to as surplus milk.

9. The Order also provides for equalization of the monetary returns to milk producers by means of a market-wide pooling system, such method being authorized by the Act. 608c(5)(B)(ii). Under this marketwide pool system all producers should receive the same uniform or blended price for their milk from handlers, irrespective of the use made of their milk by the handler, and the defendant stated as follows in his recommended decision, 29 Fed. Reg. 5597, in concluding that marketwide pooling should be provided for under the Massachusetts-Rhode Island milk order (Issue No. 9, Method and scope of pooling):

> ". . . the values of milk delivered by all producers to all regulated handlers in the market are combined into one fund and all producers supplying the market are paid the same blended price except for adjustments for butterfat and location of the plant of the plant of receipt. . . . The application of market-wide pooling under a merged order will promote market stability by insuring that all producers supplying the Massachusetts-Rhode Island market will share on a uniform basis the Class I and Class II utilization in the entire market and thus assist to permit the assembly of supplies in an economical manner for available outlets." 29 Fed. Reg. 5597-98.

10. Among the separate differential adjustments provided by the terms of the Order are the following: a butterfat differential to adjust for varying butterfat content of milk; a zone differential which adjusts for the cost involved in transporting the milk and a separate differential within the zone differential which relates to the cost incurred in receiving a producer's milk at a country plant rather than directly at a city plant, the defendant stating as follows in promulgating said Order: (Issue No. 3)

> "This amount, determined on the basis of previous hearings, is related to the difference in cost to city

plant operators of receiving milk directly from producers at such plants as compared to the cost of purchasing milk which is first received from producers at country plants located in the 21st zone and then moved to a city plant. . . . The present nearby plant Class I zone differential of 54 cents is based upon two principal factors: (1) Freight charges for hauling milk from plants located in the 21st zone to city plants, and (2) the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and costs incurred in receiving milk at city plants directly from producers." 29 Fed. Reg. 5587-88.

The foregoing is known as a direct delivery differential, and is separately provided for in some milk orders. Under Issue No. 4 involved in promulgation of said Order, entitled "Farm Location differentials", the defendant acknowledged in his recommended decision, 29 Fed. Reg. 5590, that 9 cooperatives, which represented principally producers located outside any of the specified farm location differential areas, proposed that such differentials be eliminated from the Order and that considerable testimony in support of removal of the provisions was received, but that "it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the order at this time".

11. Under Section 608c(4), the Secretary "shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing, . . . that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-604, . . .".

12. The Act also specifies that the Order shall contain one or more of the enumerated terms and conditions and no others, 608c(5), and that any incidental terms and condi-

tions of the Order shall be not inconsistent with and shall be necessary to effectuate the other terms and conditions of the order.

13. Under the nearby farm location differential of the Order, producers whose farms are located within the enumerated towns, cities, counties and States (including all of the State of Rhode Island) are paid such differential in the amount of 46 cents per hundredweight over the uniform blend price received by other producers serving the market, or such lesser sum as will equal the price of the Class I or fluid milk. 7 C.R. 1001.72(a). Under (b) thereof, additional towns, cities, counties and States are enumerated, and those producers serving the market whose farms are located within such area receive 23 cents over and above the uniform blended price for their milk, or such lesser sum as will equal the Class I or fluid milk price.

14. The farms of plaintiffs and their class are not located in either nearby differential area, and they are ineligible to receive such nearby payments. Such nearby differential payments are met by deductions from the Producer Settlement Fund or equalization pool belonging in equity to all producers serving the market. Such deduction each month reduces pro tanto the uniform blended price which plaintiffs and their class would otherwise receive for their milk except for such differential deductions. 29 Fed. Reg. 5590.

15. Under the Order, all handlers are required to report to defndant's Market Administrator by the 8th day of the month all of their sales in the different use categories of milk, in addition to other pertinent information, made by them in the previous month at the different minimum prices. 7 C.F.R. 1001.40-45. From such reports the Market Administrator computes the value of the milk sold by each handler by following the formula set forth in Sec. 1001.63 of the Order, and he then uses computations in computing the market uniform or blended price for all pool milk delivered by producers the previous month under Sec.

1001.64. In making payment to the Producer Settlement Fund or equalization pool, however, the handlers are given a credit in the amount of the nearby differential that they must pay to the producers in the nearby areas who delivered their milk to such handlers. The handlers are notified of the uniform or blended price after computation of the same by the Market Administrator from the reports previously furnished by the handlers by the 12th day of the month for milk delivered the previous month. Under Sections 1001.80-84 of the Order dealing with the Producer Settlement Fund, those handlers whose use value of milk exceeds the announced uniform blended price for the market (for each zone plant location) are required to pay such excess into the Producer Settlement Fund or equalization pool, and those handlers who disposed of their milk in primarily manufactured form, and therefore at a lower price or value than the uniform blended price, are entitled to draw out from the Fund such difference in order that such handlers might pay their producers the uniform blended price. As heretofore stated, however, all handlers are allowed a credit in an amount equal to the sums that they owe their producers for the nearby differentials in reporting and paying into the Producer Settlement Fund or equalization pool. In this manner, the nearby differential payments are borne by the Fund or pool, rather than the handlers, and such differential payments are therefore paid out of the pockets of the non-nearby dairy farmers through reduction in the uniform blended milk price which he would otherwise receive except for such nearby differential.

16. The deduction or reduction in respect to the nearby differential payments do not show on the monthly milk checks which producers receive from their handler, payments being made under the Order twice a month for their milk—on or before the 5th day after the end of the month, each handler pays the producer for the approximate value of milk received from him during the first 15 days of the

month. On or before the 20th day of the month following delivery of the producer's milk, the handler makes final payment to him at not less than the uniform blended price, adjusted by the zone, butterfat, and farm location differential payments, and minus the amount previously paid to him on or before the 5th day of the month. This is made possible by virtue of the fact that the Market Administrator keeps an account for each handler in administering the Producer Settlement Fund, and he notifies each handler of the amount he owes or is entitled to withdraw from the Fund, computed from the reports furnished by the handlers, by the 15th day after the end of the month. The handlers who owe the Fund are required to make payment to the Administrator before the 18th day after the end of the month, and the Administrator makes payment of those sums to which a handler is entitled by the 20th of the month after delivery of the producer's milk the previous month. In this way each producer may be paid the same price by all handlers.

17. Such nearby differential payments amounted to a total of $4,181,052.00 during the period from October, 1964, when the Order was promulgated, through September, 1965, a twelve months period, according to the *Monthly Uniform Price Announcement* of the Massachusetts-Rhode Island Market Administrator. According to a USDA publication, "Source of Milk For Federal Order Markets By State and County," published excerpts therefrom in the Market Administrator's *Bulletin* for the Mass.-R. I. area indicated that 79% of producer milk was received by handlers for the Mass.-R. I. marketing area from farms outside of Massachusetts and Rhode Island. Massachusetts producers numbered 1,532 and produced 17.8% of the deliveries in 1965, Rhode Island producers numbered 232 and produced 2.8% of the deliveries, and Vermont dairy farmers numbered 4,677 and produced 49.4 percent of the milk delivered. Maine, New York, and New Hampshire, the majority of whose producers are also located outside of the

nearby area, produced another 26.1 of the milk deliveries and numbered 2,480 producers. (Copy of page from *Bulletin* attached hereto).

18. In his recommended decision prior to promulgation of the milk order in 1964, defendant Secretary found that 37 cents per hundredweight represented a reasonable allowance for moving milk to market from the base or 201-210 mile zone, and that the difference in country and city plant handling amounted to 10 cents per hundredweight, or a total of 47 cents for the zone differential. The zone differential was reduced by 7 cents from the perior 54 cents because of the fact that it was found to be excessive, in respect to the "costs generally incurred in receiving milk at country plants and moving such milk to city plants." He also found that because of such fact handlers were purchasing their supplies from "upcountry" sources in increasing amounts, and that nearby producers were experiencing great difficulty in obtaining an outlet for their milk other than for manufacturing purposes.

19. Of the zone differential of 47 cents per hundredweight, it shall be paid within 80 miles of Boston, whereas the rest of the milkshed is broken up into 10 mile zones. The base or middle zone of 201-210 miles does not receive a zone allowance, but 1.2 cents is added to the uniform price for each ten mile zone as delivery of milk is made progressively nearer to Boston until the 80 mile zone is reached and the flat zone rate of 47 cents applies anywhere therein. As the ten mile zones get further away from the base zone of 201-210 miles, 1.0 cents is deducted from the uniform price until the 400 mile zone is reached, where 19 cents is deducted therefrom. The zone differential therefore amounted to a difference of 66 cents between the 1-80 and the 400 mile zone.

20. In his recommended decision promulgating the Order in 1964, defendant Secretary "found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the

principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed". He did not state when this finding was made or in what way the higher value was accounted for, but he did state that such farm location differentials have been in effect since the inception of the New England orders, and "were adopted to reflect in the pricing structure of the order's historical price relationships by location which prevailed in these markets".

21. Without regulation all milk tends to be priced at the lowest level, manufacturing milk prices, by reason of a continuing surplus and the very law of supply and demand.

22. The nearby differential provision of the milk order reduces the uniform or blended price to plaintiffs and their class in the approximate amount of 12.5 cents per hundredweight, or approximately $3,000,000.00 per year.

23. Copies of the aforesaid recommended decision, decision, and Order published in the Federal Register have previously been furnished.

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

[Filed February 24, 1967]

The applicants move on the grounds set forth herein for leave to intervene as defendants in this action on behalf of themselves and of all other nearby producers similarly situated to assert the defenses set forth in the attached Answer and to protect their direct and immediate economic interest in the funds escrowed and to be escrowed by the Order issued by this Court on January 16, 1967. All these funds otherwise would have been paid to the applicants and their class of nearby producers in the Massachusetts-Rhode Island milk marketing area. (See Order of the Secretary of Agriculture, 7 C.F.R. 1001.72.)

The applicants (eight in number) are dairy farmers located in the nearby differential area. All have marketed their milk in the Massachusetts-Rhode Island milk marketing area, and, prior to this Court's Order escrowing the nearby differential payments, all received such payments pursuant to the Secretary's Order. Regardless of the outcome of the instant action on the merits, all have a claim of right to at least a portion of the funds presently being held in escrow by the Order of this Court. Their total annual 1966 net return (after provision for return on invested capital) was only $19,740.43 and their nearby differential payments now being withheld in escrow annually total approximately $20,865.00, thus entirely eliminating any return to the applicants for their own labor. (See the Affidavits of applicants previously filed in this action as Government Exhibit No. 3 and incorporated herein by reference; see also Table I attached to Applicants' Memorandum of Points and Authorities.) Their grave economic plight is typical of that of the 2,300 producers who, prior to the Court's Order, received nearby differential payments as authorized by the Secretary's Order. The applicants seek to intervene on behalf of themselves individually and also for the benefit of all other producers in the nearby class who are similarly situated.

The applicants seek intervention of right pursuant to Rule 24(a)(2), as well as under Rule 23 of the Federal Rules of Civil Procedure, and, alternatively, seek permissive intervention under Rule 24(b)(2), and assert also that they and their class are indispensable parties to the instant matter under Rule 19 of the Federal Rules, on the following grounds:

1. *Applicants and Their Class Have a Direct and Immediate Interest Relating to the Subject Matter of this Action and In the Escrow Fund Created by the Court*

The applicants and their class presently are entitled under the Secretary's Order to the entire fund now being accumulated in the escrow account pursuant to the Order of this Court. Absent representation of their adverse claims to the fund, the fund cannot be distributed without depriving the applicants and their class of property without due process of law. On the question of the validity of the nearby differential payment provision of the Secretary's Order, the applicants' property interests are directly involved and they are indispensable parties.

2. *Applicants and Their Class Are Entitled to Intervene of Right Because Disposition of This Action Will Impair and Impede the Ability of the Applicants and Their Class to Protect Their Interests.*

In the event the funds escrowed under the Court's Order are distributed to the approximately 6,600 non-nearby producers, then as a practical matter the applicants would be deprived of any realistic opportunity to assert their claim to the funds. As a practical matter, it would be impossible to trace and bring action against 6,600 individual farmers to assert claims against such amounts as such non-nearby producers might individually receive. If denied intervention, the present action would not be *res judicata* as to the applicants and their class, but nonetheless their rights would be effectively and permanently impaired.

3. *The Interests of the Applicants and Their Class Do Not Fully Coincide With That of the Defendant and Their Interests Would Not Therefore Be Adequately Represented by the Defendant.*

The defendant has no monetary or economic interest in the escrow fund. The applicants have a direct, immediate interest in that fund and an economic interest in maintaining the validity of the Secretary's Order. In the earlier hearings before this Court, the defendant expressly stated that it represented the Government and the public interest but not necessarily the interests of the individual producers which may not coincide at all times with the public interest as the defendant sees it. The defendant has not raised certain of the defenses asserted by the applicants in their Answer attached hereto and may not at any time raise such defenses for public or internal governmental reasons although such defenses are of utmost importance to the protection of the applicants' interests.

The applicants seek to present additional facts and grounds to support the validity of the nearby differential and of the Secretary's Order. Since they, and not the Government, have a direct and immediate financial stake in the outcome of this action, they and they alone can bring to the attention of the Court the most facts and can best explain their implications. See *Textile Workers Union of America v. Allendale Co.*, 96 U.S.App.D.C. 401, 226 F.2d 765 (1955), *cert. denied*, 351 U.S. 909 (1956); *Atlantic Refining Co. v. Standard Oil Co.*, 113 U.S.App.D.C. 20, 304 F.2d 387 (1962).

4. *Alternatively, Applicants Should Be Granted Leave to Intervene Under Rule 24(b)(2).*

The applicants and their class should, in any event, be granted leave to intervene as permissive interveners. The defenses raised by applicants have questions of law and fact in common with the instant action. Their intervention will in no way unduly delay or prejudice the adjudication of the rights of the present parties to the instant action.

WHEREFORE, the applicants pray that this Court:

1. Grant the motion for intervention, and

2. Grant such other relief as may be appropriate in the premises.

[Subscription Omitted in Printing]

[Filed March 13, 1967]

[Caption Omitted in Printing]

OPPOSITION TO MOTION FOR ORDER DIRECTING ACTION TO BE HELD IN ABEYANCE AND TO MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Plaintiffs say as follows in opposition to defendant's motion for holding these proceedings in abeyance "pending exhaustion of administrative remedies":

1. Defendant promulgated the order provision under attack herein on October 1, 1964, when he first issued the Massachusetts–Rhode Island milk order, and it is the nearby differential provision of that order that plaintiffs seek to declare invalid and void. That order is a final order, and the plaintiffs' complaint alleges that they are sustaining irreparable injury by virtue of the illegal promulgation and operation of such order provision. The fact that defendant may have under consideration an amendment to said order does not lessen its finality, nor does it preclude plaintiffs from seeking the relief requested in their complaint. The hearing to which defendant refers was concluded months ago, and all that remains is for defendant to issue his recommended decision and his decision. No evidence can be presented, and, in fact, an amended order may never be issued. The plaintiffs acknowledge the general rule concerning exhaustion of administrative remedies and its applicability to those cases where a prescribed administrative remedy is granted by statute, etc., and where no final action has yet been taken by the agency that injures individuals subject to the regulation of the agency. Those factors are not present here, for the plaintiffs have shown that they are

being irreparably injured by defendant's action and the order provision. The fact that the contested payments involving the nearby differential are presently in escrow is without significance in respect to whether plaintiffs have a right to bring this suit. Nor is it of any significance in respect to whether they have a right to pursue their action to a conclusion. It does reflect, however, upon the allegations of the defendant and the applicants for intervention that the nearby producers are in dire financial condition as a result of the present action, in that the defenses raised by both the defendant and said applicants are conducive to delay in determining the validity of the nearby farm location differential.

2. The doctrines of exhaustion of administrative remedies and primary jurisdiction do not apply to this action for the additional reason that only a question of law is involved herein, a fact acknowledged by defendant in January when he proposed a timetable for the hearing of this case on cross-motions for summary judgment, proposing that he file his said motion on January 27, 1967. It is well settled that when a case involves a question as to whether an administrative agency has acted in excess of its statutory powers, that question must be decided by the courts—for the administrative agency cannot determine the limits of its own statutory power or authority. In fact, if the agency transcends the boundaries of its authority under the Agricultural Marketing Agreement Act of 1937, as amended, and promulgates an order that is not authorized by law, the courts have the *duty* to step in and they must "jealously scrutinize" such agency's action when milk producers allege that defendant is illegally diverting their monies in violation of the Act. *Stark v. Brannan*, 87 App.D.C. 388, 185 F.2d 871, affd. 72 S.Ct. 433, 342 U.S. 451; *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559. The cases cited by defendant concerning exhaustion of administrative remedies and primary jurisdiction are separately referred to hereinafter, but it is noted that they involved a specific statute where an exclusive manner of administrative or judicial review was prescribed or where an entirely different fact situation existed.

In *Parker v. Lester,* 112 F.Supp. 433, the Court stated:

> "Exhaustion of administrative remedies is not required as a prerequisite to judicial relief where questions of *fact* and administrative expertise are not involved but the issue is one of law and there is a showing of inadequacy of the prescribed procedure and of threatened or impending irreparable injury flowing from delay incident to following of prescribed procedure."

In the instant case, the only administrative remedy prescribed by the Act and for judicial review of administrative action is that under Sec. 608c(15) relating to handlers, not producers. This is why the plaintiffs may not appeal to the Secretary concerning a provision of an order or seek judicial review in many instances–the Act regulates handlers, not producers. The latter have standing only when they can show interference by the defendant with a legal right of producers –such as diversion of their monies and action in excess of statutory authority. The case of *Stark v. Wickard,* supra, giving producers standing to sue under such circumstances indicates that the courts should be sure to look closely at producers' complaints, since they have little opportunity to correct any injustices that they may sustain. In that case, the Supreme Court said at page 569:

> "The only opportunity these petitioners had to complain of the contested deduction was to appear at hearings and to vote for or against the proposed order, Act, Sec. 8c(3), 8c(9) and 8c(19); Order, preamble. So long as the provisions of the Order are within the statutory authority of the Secretary such hearings and balloting furnish adequate opportunity for protest . . . . But where as here the issue is statutory power to make the deduction required by the Order, . . . a mere hearing or opportunity to vote cannot protect minority producers against unlawful exactions which might be voted upon them by majorities. It can hardly be said that opportunity to be heard on matters within the Secretary's discretion would foreclose an attack upon the inclusion in the Order of provisions entirely outside the Secretary's delegated powers."

It should be noted that there was real, not threatened, injury to the plaintiffs in this case by virtue of the fact that the challenged order provision was already in existence. Many cases hold that there is no need to exhaust administrative remedies or supposed remedies in cases involving void orders, *Phillips v. Fidalgo Island Packing Co.*, 230 F.2d 638; *Sunshine Dairy v. Peterson*, 193 P.2d 543 (last paragraph) 560, wherein it is stated:

> "The rule requiring plaintiff to exhaust his administrative remedies before resorting to the courts has no application when the attack upon the administrative order is based upon the contention that the administrative body is without statutory power to issue the order. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557; *Varney v. Warehime*, 6 Cir., 147 F.2d 238."

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, the Court stated at page 254:

> ". . . We know of no case where the Court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. It would be a travesty of law and an abuse of the judicial process to force litigants to undergo an expensive and merely delaying administrative proceeding when the case must eventually be decided upon a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency . . .".

The Court is also respectfully referred to the cases of *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, and to the separate opinion in *Fed. Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, wherein it is stated:

> "Contrariwise, where a decision of a case depends on determinations of a question of law as such, either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, the doctrine of primary

jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency. (citing cases)".

In fact a serious question arises as to whether defendant or applicants can even bring up the doctrines of administrative remedies and primary jurisdiction at this stage of the proceedings. If brought up at the start of the proceedings, they obviously could not have precluded the court from recognizing the plaintiffs' claim of irreparable injury, and the asserted defenses should therefore not even be available at this stage. Defendant is aware of the status of his own proceedings, even if his agent-attorney was not so informed, and he may not obstruct an appeal to this court by plaintiffs through the issuance or delay in the issuance of decisions that relate to the court action. In *Union Producing Co. v. FPC,* 127 F.Supp. 88, Judge Holtzoff stated:

> "It appears from the allegations of the complaint, however, that the plaintiff has in fact filed with the Commission a petition for rehearing, which still remained undetermined when the regulations were about to go into effect and this action was brought. An administrative agency may not obstruct an appeal to the courts by unreasonable delaying a decision or an application for administrative redress and then turning around and claiming that the party has not exhausted his administrative remedies."

Contrary to the allegations in paragraph number 4(a) at page 3 of defendant's Motion, the defendant's 1964 "offer" to review nearby differentials "when it is shown that further consideration in hearing is appropriate" does not provide a basis for referring the whole matter to defendant at this time. The defendant was required in 1964, under the Act, to determine that such differentials would effectuate the declared policy of the Act and of the provision relating to uniformity of prices to producers. Sec. 608c(4). Instead, he found that "it was not established that the farm location differentials provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the order at this time". an

entirely different thing from that which he was required and failed to find under the Act. Under these circumstances, such an invitation cannot be construed to preclude the plaintiffs from seeking judicial relief. The plaintiffs also regard such invitation to be of nebulous and doubtful nature in respect to application to themselves for the reasons set forth in the following paragraph.

3. In an administrative hearing, as well as in a referendum regarding approval or disapproval of a milk order, a cooperative association is allowed by the Act to represent its members. Consequently, very few dairy farmers participate in such hearings, and it is quite evident that a handful of dairy farmers would not possess the technical knowledge to present their views in a manner which would require acceptance by the defendant. Their view might be at variance with that of their cooperative and, in any event, would normally be very brief and limited. During the hearings that resulted n promulgation of the 1964 milk order, a question was raised as to whether some cooperatives actually represented their membership in said hearing and also as to whether some cooperatives even consulted their membership concerning topics or matters considered at such hearings, as indicated by the excerpts from the transcript of said hearing set forth below:

> [3928] EXAMINER HOLSTEIN: Off the record.
>
> MR. HALL: No, on the record.
>
> EXAMINER HOLSTEIN: I am not going to let you prove what the law is. That is not in issue here.
>
> THE WITNESS: If it will save time I will withdraw the statement that we have a pretty good bonding law.
>
> MR. HALL: I am not saying we don't but I am saying it is not what you say it is.
>
> THE WITNESS: What I meant was I think it has worked fairly well over the years.
>
> EXAMINER HOLSTEIN: That is all, Mr. Hall.
>
> MR. HALL: Just a moment, Mr. Hearing Examiner.
>
> EXAMINER HOLSTEIN: Yes, take your time.

By Mr. Hall:

Q. Do you feel, Mr. Garelick, that the existence of the Federal regulations is of benefit to the non member?

A. Of benefit to the non member?

Q. Yes.

A. The existence of regulations where?

Q. In any of these New England markets where they are presently in effect?

A. Let me say that I don't think it is of benefit to a lot of non members in relation to the amount of regulations in New England prior to the southeast order.

Q. Would you mind repeating that? I don't quite understand.

A. I don't think it is a benefit to a lot of non members if we compare it to their position in 1958.

Q. Is it your view that the existence of the federal order in southeastern New England prejudices a number of producers?

A. Definitely. Prejudiced, some in favor and some against.

Q. Do the non members in any great numbers attend the hearings where proposals for amendment to the federal orders are being considered?

A. I don't think they do any more or any less than producers that belong to cooperatives.

Q. Producers that belong to cooperatives have representatives here?

A. That is your opinion.

. . . Laughter . . .

Q. Whether you like the representatives or not is not important. They have representatives.

A. I have no quarrel socially with the representatives. My quarrel is whether they truly represent them.

Q. Do you think that the producers would be better off if they appeared themselves representing themselves?

MR. CHERNAUSKAS: Mr. Examiner, this is a very nice interchange, but I think we are not really helping the record.

EXAMINER HOLSTEIN: I will sustain that.

MR. CARROLL: May not like the answer.

MR. HALL: The answers don't concern me too much. I think that is all.

EXAMINER HOLSTEIN: Any further questions?

Mr. Sykes.

By Mr. Sykes:

Q. Mr. Garelick, is it your position that there is no choice as to the expenditures which a non member must make in the case of the non member marketing deductions and it is your position that there should be some choice?

A. It is my position that they should not have to pay for a service they don't want, especially when it has been voted in by people who don't pay for the service.

Q. Now with reference to the calibration of bulk tank in the Commonwealth, you agree this is a function of the Division of Standards in the Bureau of Labor, and Industries?

A. I don't think so.

Q. Are you familiar with the fact that the law specifies that recalibration shall be done every two years?

A. I understand that there was a law recently passed within the past couple of years that more funds were appropriated and this is why we are getting this recalibration.

Q. Do you also understand that the law provides that —

EXAMINER HOLSTEIN: Mr. Gallup has handed me a tabulation entitled "Population of 19 Massachusetts Towns, 1950-1955-1960," the source of which is indicated on the bottom of the tabulation, which he has

requested to be marked as an exhibit and admitted in evidence.

Are there any questions on this doucment?

If there are no objections, the tabulation is marked Exhibit 99 and is admitted in evidence and becomes a part of the record.

(Exhibit No. 99 marked for identification and received in evidence.)

EXAMINER HOLSTEIN: You may step down, Mr. Gallup.

(Witness excused)

EXAMINER HOLSTEIN: We will have a ten minute recess.

(Whereupon, a short recess was taken.)

EXAMINER HOLSTEIN: Let us come to order, please.

Mr. Hall, I understand you have a two line statement that won't take over a half hour.

MR. HALL: That is correct.

EXAMINER HOLSTEIN: You have been sworn?

MR. HALL: No, this is not in the nature of any testimony, Mr. Hearing Officer.

EXAMINER HOLSTEIN: I thought you wanted to testify. You can make a statement from the floor at any time.

MR. HALL: A statement as attorney for New England Milk Producers Association, Northern Farms, Maine Dairymen's Association and on behalf of the Cooperative Dairy Service, I would like to register each of those organization as opposed to Proposal No. 57. We feel that that involves legal questions which are not appropriate to be discussed at this hearing but which we will discuss in brief.

EXAMINER HOLSTEIN: Thank you, sir.

MR. AMON: Does that statement allow me to ask one question?

EXAMINER HOLSTEIN: You can ask him anything you want off the record.

MR. AMON: I have been doing that for too long a period of time. I want it on the record. I don't care about the fact he is not sworn.

EXAMINER HOLSTEIN: A statement made from the floor is not subject to cross examination.

MR. AMON: I wish to ask whether or not any poll of the membership of any of the organizations that he has referred to has been taken authorizing the same statement that he has made.

EXAMINER HOLSTEIN: Do you care to answer that question, Mr. Hall?

MR. HALL: We have not taken a poll of the individual members of any of these organizations, any of the producer members of these organizations.

EXAMINER HOLSTEIN: All right, sir.

Mr. Lee, I understand you have a statement you wish to make or testimony you wish to give.

MR. LEE: Yes.

EXAMINER HOLSTEIN; Let the record show that Mr. Lee has been previously sworn.

Whereupon,

JAMES D. LEE

was called as a witness and, having been previously duly sworn, testified as follows:

DIRECT TESTIMONY

THE WITNESS: I wish to put in some supplementary information in opposition to Proposals 23 and 24 which simply takes the form of introducing some additional material from the Market Administrator's Review.

It will be recalled that I testified that the Administrator's Marketing Service Program was eminently successful and I referred to the checking of the calibration of non-members' bulk tanks. I wish to have official notice taken of the following articles which have appeared in issues of the Review.

MR. MAHONEY: Are those issues already in evidence?
EXAMINER HOLSTEIN: Do you wish to offer them as exhibits or ask for official notice to be taken?

* * *

In view of the fact that many of the plaintiffs' class would be represented at an administrative hearing by the cooperative which attempted to intervene herein as a defendant and in favor of the validity of the nearby differential, could those plaintiffs actually have any administrative remedy? If such cooperative may cast the votes of its members for or against a milk order, would such requested referral of these proceedings to the agency actually amount to a denial of an opportunity to contest the challenged differential? The plaintiffs note that the same law firm that represents such cooperative composed primarily of non-nearby producers now represents the applicants for intervention herein—nearby producers. The plaintiffs raise the question, in view of such circumstances and of the Government's interwoven defense herein with both applicants herein, cooperative and now nearby producers, whether the referral of the instant proceedings for administrative determination would be a compromise of the plaintiffs' right for judicial declaration of the invalidity of the nearby differential. It is a matter of record in these proceedings that the defendant and such applicants have adopted the arguments, affidavits, etc., of each other and that the defendant has evidenced a position herein that the nearby differential is valid and will be maintained in the milk order. The Court may also note that the hearing referred to by defendant also included proposals to increase the area to which the nearby differential applies, which would result in even greater injury to plaintiffs if adopted. Plaintiffs believe that under the facts presented in this case, and in view of the *Blair* decision, the defendant should actually hold his hand until determination of the legal question by the Court, for otherwise only confusion and delay would result if the agency attempted to exercise the power accorded to the courts by Article III of the Constitution and the doctrine of separation of executive and judicial power.

Plaintiffs make the following observations concerning the cases cited by *defendant* in support of his motion:

In *United States v. Ruzicka,* the Court stated at page 295:

> "We are dealing here solely with the right of *handlers.* This is not *Stark v. Wickard,* 321 U.S. 288. In that case it was concluded that since Congress had provided no administrative remedy for a producer to review the legality of an order against him, presumably the courts were not closed to him. But by Sec. 8c(5) Congress has made precisely such provisions for handlers. As to them the procedural scheme is complete."

In *Fed. Power Com. v. Colorado Interstate Gas Co.,* the Natural Gas Act was involved, which "prescribes explicitly the procedure to be followed by any person seeking judicial review of an order of the FPC and limits the scope of that review as follows . . .". The Court then pointed out that Sec. 19(a) and (b) of the Act require that objections must be made before the Commission in order that they may be raised before the Circuit Court, etc.

In *Interstate Commerce Commission v. Atlantic,* a question was involved concerning the reasonableness of carriers' rates, an appropriate subject for administrative determination. In addition, this case involved the Interstate Commerce Act, which provides for the relief and procedure available to challenge the Commission's action or that of carriers in Sec. 8 and 9 thereof. The Court stated that "accordingly, a shipper who commences his Sec. 9 reparations proceeding in the District Court will nevertheless be required to repair to the Commission for decision of issues like the reasonableness of rates, which call the primary jurisdiction doctrine into play." The Court also referred to these "questions of fact" at page 591 of that case, and to the Act's provisions (Sec. 17(9) and 16(2)) for statutory judical review. The Court made mention of the fact that the Commission could make provision for uniform rates by carriers in determining the reasonableness of the same, but that various court actions would provide a lack of uniformity in the reasonableness of rates charged by carriers.

In *Meyers v. Bethlehem Shipbuilding Corp.*, the National Labor Relations Act was involved, in which Congress provided an appropriate procedure before the Labor Board and an adequate opportunity, through review by the Circuit Court of Appeals, to secure judicial protection against possible illegal action by the Board; "and the grant to the Board and the Circuit Court of Appeals of *exclusive* jurisdiction is to prevent any person from engaging in any unfair labor practice affecting commerce is constitutional". The employer involved in the case did not go to the Board concerning the charge of unfair labor practice against him, and the Court referred to the provision of the Act which stated:

> "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

In *Unemployment Comp. Com. v. Aragon*, a question concerning whether an "active" labor dispute and negotiations regarding the same was involved, and the Court necessarily regarded the determination of this factual issue and interpretation of the word "active" as being proper for the Commission to decide.

In *Aircraft & Diesel Corp. v. Hirsch*, the Court pointed out that the Renegotiation Act provided for administrative determination of excessive profits by the War Contracts Price Adjustment Board and for a redetermination *De Novo* by the Tax Court, and that consequently the petitioner could not seek relief in the District Court. The Court further added that petitioner, a contractor, had an adequate remedy at law by suit against three subcontractors, a remedy the plaintiffs do not have in this case.

In *Stark v. Wickard*, cited by *plaintiffs*, the Court distinguished United States v. Morgan, cited by defendants, in respect to the adequacy of a hearing and judicial review.

In *Addison v. Holly Hill Fruit Products, Inc.*, the only other case cited by defendant, the Court stated at page 616:

> "The determination of the extent of authority given to the delegated agency by Congress is not left for the decision of him in whom authority is vested."

In that case, the Court found that the administrator had exceeded his authority in designating a specific number of employees within a definition that also involved an interpretation of other language, and that the latter should not be stricken because of the invalidity of the separate but interwoven minor part of the order, and it consequently referred the matter to the * * *

4. The contention that the proposal to delete the differential precludes this action because it was made by a non-nearby dairy farmer does not merit a reply. That producer did not represent plaintiffs' class as such, but only himself in such hearing, and the fact that plaintiffs now represent the class of non-nearby dairy farmers in this legal action is an entirely separate matter. In addition, the plaintiffs have already established the virtual impossibility of their class being truly represented in any administrative hearing under the circumstances present in this case.

5. The defendant adopts the final argument of applicants that the latter are entitled to an administrative hearing wherein the defendant may make new findings or further findings, "and, if necessary, conduct new hearings and frame a new order". The applicants maintain that the defendant must find, prior to any Court decision, that the order without the nearby differential meets the declared policy of the Act. It is difficult to conceive of how the elimination of an illegal provision from the order by the Court would violate the policy of the Act or the duties of the Secretary thereunder. In plaintiffs' estimation, it would do just the opposite and insure a proper and legal order and legal action by the defendant. The order would still be in existence in all other respects except the illegal provision, and no constitutional rights are violated by the court's action in declaring such invalidity at this time. It is the plaintiffs' position that this is the only way that their constitutional rights to due process may be redressed, in that the administrative action complained of consists of the defend-

ant's confiscation of their property and the giving of the same to the preferred class of nearby producers, the latter having no right thereto except under and by virtue of the operation of the illegal nearby differential provision. In *Blair*, the defendant raised many of these same arguments, and the pleadings herein reflect that he will adequately represent any claim that the applicants might make herein, since the latter has raised no argument or defense which has not been adopted or embraced by defendant in his pleadings herein.

Further, it is apparent that upon the declaration of the invalidity of the nearby differential by judicial action, the defendant may still issue the proposed amended order without such differential. It is possible that he might have done so without judicial declaration of the differential's invalidity, and the applicants would have no basis for complaint concerning further findings, another hearing, a voting referendum, etc. Under these circumstances, it is obvious that the contentions of the defendant and the applicants are totally without merit, since the Court would be performing its proper function, and its determination that the differential was unauthorized and void would actually assist the defendant in the issuance of any legal amended order. From all of the foregoing, it is evident that the question as to whether defendant has exceeded his statutory powers is exclusively within the domain of the Courts, and it is not to be determined by the agency claiming such power or by a vote or referendum conducted by defendant among cooperative associations.

6. Pages 3-6 of defendant's motion relate to the *Green Valley* case of 1939, wherein the First Circuit stated that nearby differentials could be sustained as Market differentials and Location differentials. Plaintiffs have already stated that such "holding" was dictum, for only handlers were before the Court and the Court itself belatedly acknowledged that the handlers had no standing to even raise the question of nearby differentials–since the payment of the same was not made by handlers but by producers from out of the marketwide pool. The Court of Appeals in *Blair* also noted this obvious fact in foot-

note 34 on page 14 of its opinion, and it thoroughly considered the contentions raised by defendant in respect to the "market differential" argument, since the analogy of the Boston nearby differential and the New York-New Jersey differential as expounded in *Green Valley* constituted the main argument of defendant and the *amici* in the New York case– as is evidenced by the briefs filed in that case. One of the outstanding features of the *Blair* opinion is the extent of its holding; it covered virtually all loose ends because it undoubtedly realized that attempts might be made to limit the significance of the case. Defendant states on page 6 that "Thus, *Blair* appears not to have reached the "market differential" ground on which *Green Valley* rests." It is noted that the Court in *Blair* stated at page 15:

> "Third, the court indicated that it was *primarily* persuaded by its belief that the adjustment could be sustained as "customary market differentials based upon the location of farms . . ." 108 F.2d at 346. Although Section 8c(5)(B)(a) does permit "market . . . differentials customarily applied by the handlers" concerned, it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk. The "market differential" rationale is plainly not a tenable basis for the nearby differential."

The Court in *Blair* also referred to the fact that *Green Valley* rested upon the alleged ground that milk from nearby farms would be "delivered to handlers at points nearby the market", and that in the N.Y.-N.J. milk order the Secretary "has elsewhere provided differentials to compensate for deliveries made to nearby handlers", referring in footnote 35 on page 15 to "the transportation differential and direct delivery differential". Since the Massachusetts-Rhode Island milk order contains these identical differentials in the zone differential, it is obvious that the alleged ground relied upon by the First Circuit is unavailable to the defendant and that he could not have relied upon such decision in respect to the nearby differential as a logical basis therefor. In *Blair*, the Court of

Appeals refers to the fact that "the First Circuit referred to evidence indicating that nearby farmers had a more uniform level of production", but that this factual hypothesis was negatived by the Secretary himself as justification for the nearby differential. At page 10 of its opinion in *Blair*, the Court noted that the Secretary found "that there is considerable variation in the seasonal pattern of production among *individual* producers in all sections of the milkshed . . .", and that a "base rating" plan might be appropriate to compensate producers for this factor. In 1937 when the nearby differential was first promulgated by defendant in the Boston milk order, he also found that "only about one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors". During the 1964 hearing, the defendant referred to the "base excess" plan of distributing producer returns and his findings are set forth in his decision, 29 Fed. Reg. 11205, at page 11225, middle paragraph (c), wherein he also refers to the fact that such plans "have been incorporated in a number of Federal orders, but only for the statutory purpose of minimizing seasonal fluctuations in milk production". He then refers to the fact that adoption of such plan was undesirable, in that the function thereof was already being performed by the establishment of prices which tend to equate demand and supply for the market. In this connection, the problem of seasonality of production presently affords no basis for the promulgation of the nearby differential or the apportionment of the fluid milk market. In fact, a recent amendment to the Act requires that any base rating plan be subject to *individual* vote of producers, recognizing the potential harm that such a device could occasion if not properly promulgated and if adequate safeguards did not exist to preclude the abuse of such a provision. It would therefore appear that the only other alleged ground utilized by the Court in *Green Valley*, a more uniform level of production, is not available to the defendant or applicants as a basis for the nearby

differential, just as *Blair* indicates that it was not available as such basis in the N.Y.-N.J. milk order. Under these circumstances it is difficult for plaintiffs to perceive any basis for avoiding the decision in *Blair*, especially when the holding in that case expressly referred to the fact that the defendant could not divert a portion of the uniform price from the plaintiffs by virtue of the nearby differential, irrespective of his reasons therefor, and that if any "value" existed in respect to nearby milk (other than that attributable to quality and transportation) it might afford a basis for payment of the same by handlers, not producers. It is plaintiffs' contention that no opposing points and authorities have been filed herein to their motion for summary judgment for the evident reason that there is no ground upon which to defend the unauthorized action of the defendant in promulgating the nearby differential, and that the only opportunity to avoid the holding in *Blair* is by the attempted referral of the matter to the administrative agency. The defendant's motion for such relief must be denied.

7. In respect to the matter of the administrative record, it is noted that this was not a problem on January 11, 1967, when defendant proposed that his motion for summary judgment be filed on or before January 27th. Now that the contested funds are being escrowed it would seem that this would constitute more reason for expediting the proceedings—as defendant proposed even after the granting of the preliminary injunction. The only other conclusion is that the nearby producer is not in the dire financial straits as presently represented, and it is noted that the affidavits filed in behalf of the nearby producers prior to the preliminary injunction referred to their farm investments of over $200,000 in some instances and that it might be necessary to sell the farm for a housing division or development if such differentials were not forthcoming as usual from the non-nearby dairy farmers' pockets.

The plaintiffs contend that the record referred to in *Blair* relates to the recommended decision and the decision issued by defendant Secretary, as published in the Federal Register and concerning which the Court can take judicial notice. This

is where the Secretary's "underlying rationale" and his findings and conclusions are set forth in respect to the promulgation of the nearby differential. As stated in *Blair*, the Court must take into account the "narrow confines of the Secretary's power", and it must determine the validity of the order provision in the light of "the purported source of authority" and "the underlying rationale that the record discloses were relied on by the Secretary". In other words, where is the provision in the Act that specifically authorizes this order provision and where is the Secretary's justification or rationale for such promulgation under the particular provision of the Act? In a case of statutory power or authority, this simply involves placing the Act beside the order provision and the examination of the Secretary's decision tying the two together. It is not a case of administrative law involving a question as to whether there is substantial evidence in the record to support the defendant's determination or decision. The basic issue is one of statutory power, and if the defendant has acted in excess of his powers it does not matter what evidence is in the administrative record. The latter is composed almost exclusively of hearsay, opinions, self-serving testimony and like material, and the plaintiffs maintain that the rationale of the defendant as expressed in his decision is to be compared with that specific part of the Act upon which he claims such nearby differential provision is authorized. Defendant's finding at 29 Fed Reg. 11213 regarding "historical price relationships by location" and "customarily somewhat higher values" of nearby milk, above transportation costs or even handling costs, constitutes no justificaton or acceptable rationale for the nearby differential under any part of the Act. The preservation of price preferences actually violates the Act's command that all producers shall be paid a uniform price for their milk, and the question of "value" is a factor for the consideration of the handler, not for payment by fellow producers, all of which is conclusively settled by *Blair*. Further, the order involved here is the Massachusetts-Rhode Island milk order, not the several milk orders consolidated into such order in 1964, and the administrative records of those prior milk orders

are not necessary herein. It therefore does not appear that the compilation of such administrative records is a just ground for further delaying the disposition of this case on motions for summary judgment.

8. Plaintiffs appreciate that the Department of Justice attorney may be assigned to another case before this Court and that he or they are not listed as of counsel on the defendant's motion for extension of time and for referral of the proceedings to the defendant. They have been listed on all other papers filed herein, including those of the defendant filed on February 27th containing the defendant's Answer herein, and they are presumably familiar with all aspects of the present proceedings. Plaintiffs feel that under all the circumstances they are forced to ask the Court to deny the requested extension of time to file defendant's motion for summary judgment. With all respect to said attorneys, it is noted that the Assistant United States Attorney involved in representing the defendant herein also represented him in the District Court in the *Blair* case—and secured a favorable ruling for the defendant in that case. The defendant is much more than adequately represented herein. Plaintiffs do not believe such request is fair to their counsel, the farmers involved, or to the Court. The Court has given a great deal of its time to this case, and it should proceed to hear the motions for summary judgment without delay, or at least by March 20th. Plaintiffs' counsel also has commitments of his time. He has obtained the assistance of additional counsel because this case is taking up more than his normal work-day, and he has scheduled his time and work with a view to disposing of this case on the merits in the next week. Such delay would further upset his schedule and cost him additional loss of income. Plaintiffs feel that the balance weighs heavily against any additional delay. They further feel that such extension is improper after plaintiffs have filed their motion for summary judgment, for it would allow defendant about two months instead of 10 days to study plaintiffs' motion and formulate a response thereto. A like extension of 30 days was also requested by defendant after plaintiffs filed their motion herein for determination that the

suit was maintainable as a class action, in order that defendant might "study" said motion. Plaintiffs do not feel that such extensions are proper under all the circumstances of this case.

WHEREFORE, plaintiffs request that the motion for extension of time and that for an order holding these proceedings in abeyance be denied.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

(Filed Mar. 13, 1967)

Order Denying Motion to Hold Proceedings in Abeyance

Upon consideration of defendant's motion filed herein March 6, 1967 to hold proceedings herein in abeyance pending an alleged exhaustion of administrative remedies and of the opposition thereto, and it appearing to the Court that this action involves certain provisions of a milk marketing order promulgated by defendant in the year 1964, that plaintiffs challenge said provisions on the ground that they are in excess of the statutory authority of defendant under the Agricultural Marketing Agreement Act of 1937 and that plaintiffs have been injured thereby, and it further appearing to the Court that the issue presented is one for judicial determination, it is by the Court this 13th day of March 1967:

ORDERED that the motion of defendant to hold the proceedings in abeyance be and the same is hereby denied.

BURNITA SHELTON MATTHEWS
Judge

[Filed Mar. 13, 1967]

[Caption Omitted in Printing]

ORDER EXTENDING TIME

Upon consideration of the motion of defendant filed herein March 6, 1967 for an extension of time for the filing by defendant of his response to plaintiffs' motion for summary judgment, it is by the Court this 13th of March 1967:

ORDERED that the time for defendant to respond to plaintiffs' motion for summary judgment be and the same is hereby extended from March 6, 1967 to and including March 20, 1967.

/s/ Burnita Shelton Matthews
Judge

March 17, 1967–Margin endorsement on "Objections to a Proposed Order Concerning Denial of Intervention" filed by Zuber, et al., was as follows: "Objection overruled."

[Filed Mar. 17, 1967]

[Caption Omitted in Printing]

DESIGNATION OF PARTS OF ADMINISTRATIVE RECORD RELATING TO PROMULGATION OF NEARBY DIFFERENTIAL OCTOBER 1, 1964

The following pages of the administrative record, exclusive of exhibits, briefs, etc., involved in the promulgation of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001, on October 1, 1964, contain references to the nearby differential or related matters, this recitation not being a waiver of any objections thereto by plaintiffs but provided solely for the purpose of preventing any additional delay on the hearing of plaintiffs' motion for summary judgment by either defendant or applicants for intervention, who could also obtain said record or review the same at the Department of Agriculture if the same is necessary in order to file opposing points and authorities to plaintiffs' said motion, rather than rely upon

the defendant to furnish the said record to applicants for intervention herein:

Volume	*Pages*	*Volume*	*Pages*	*Volume*	*Pages*
A	205-210	E	1700-63	H	2639-41
A	220-224			H	2647
A	237	F	1944-54		
A	254-55	F	1996	J	3334-47
		F	2091-92	J	3392-42
B	470	F	2125-51	J	3474-75
B	584-594	F	2164-74		
B	686			K	3709-12
		G	2277-81	K	3750-63
C	928-932	G	2290-92	K	3770-01
C	937-955	G	2305-14	K	3929-30
		G	2321-36	K	3979-72
D	1264-70	G	2390-04	K	
D	1348	G	2449-50	L	4123-41
D	1430	G	2524-57	L	4258-79
				L	4288-93
				L	4359-70
				L	4486-87
				L	4497-06

[Subscription Omitted in Printing]

[Filed Mar. 17, 1967]

[Caption Omitted in Printing]

MODIFICATION OF PRELIMINARY INJUNCTION

This Court having on January 16, 1967 entered a preliminary injunction in this cause, requiring that all amounts payable to nearby milk producers under the nearby "farm location differential" provisions in the Massachusets-Rhode Island Milk Marketing Order (7 C.F.R. 1001.72), for milk delivered in December 1966 and thereafter, be placed in an Escrow Fund *pendente lite;* plaintiffs, however, having disavowed any claim to such portion of said differentials as is *pro rata* attributable to the marketing by the nearby milk producers of their own milk delivered in December 1966 and thereafter; and the parties having consented to modification of the preliminary

injunction, so as to permit ratable distribution to the nearby milk producers of such *pro rata* share of said differentials.

It is by the Court this 17th day of March, 1967,

ORDERED that the preliminary injunction issued in this cause on January 16, 1967 be, and hereby is, modified as follows:

1. That defendant Secretary, acting by or through his Market Administrator for the Massachusetts-Rhode Island Milk Marketing Order, shall as soon as practicable ratably distribute to each milk producer whose farm is located within the "farm location differential" areas specified in 7 C.F.R. 1001.72 (herein referred to as "nearby milk producers") that portion of the sum (including interest accrued thereon) in the Escrow Fund as is *pro rata* attributable to the milk he delivered during the months of December 1966, and January and February 1967, under the said Milk Marketing Order.

2. That beginning with milk delivered on and after March 1, 1967, like ratable monthly distribution shall be currently made on or about the 20th day of the succeeding month to each nearby milk producer of that portion of the nearby "farm location differentials" as is *pro rata* attributable to the milk he delivers monthly under the said Milk Marketing Order; the remaining portion of such differentials shall continue to be placed in the Escrow Fund established under the preliminary injunction issued January 16, 1967, pending further order of this Court; and the records and monthly reports required thereunder shall henceforth disclose both the *pro rata* amounts paid out to the nearby milk producers under this modification of the preliminary injunction, and the remaining amounts of the said differentials retained or hereafter placed monthly in the Escrow Fund.

3. That defendant Secretary shall calculate the *pro rata* share of such differentials to be paid to each nearby milk producer under paragraphs 1 and 2 above, by multiplying the aggregate quantity of milk delivered by such nearby milk producer in the period for which distribution is to be made by a rate per hundredweight computed for purposes of paragraph

1 hereof by dividing the total sum (including interest) then in the Escrow Fund by the total hundredweight of pool milk delivered by all milk producers under the Milk Marketing Order in the months of December 1966 through February 1967; and computed for purposes of paragraph 2 hereof by dividing the aggregate total of such differentials for the month by the total hundredweight of pooled producer milk used to compute the basic blended price for such month; and in each case rounding the result to the nearest tenth of a cent.

4. That ratable monthly distribution to nearby milk producers in accordance with paragraphs 1 and 2 above may be made by defendant Secretary or his Market Administrator directly or indirectly, including, where appropriate, distribution through handlers or to or through cooperative associations of which the affected nearby milk producers are members.

5. All provisions of the preliminary injunction entered January 16, 1967, not specifically modified hereby, shall continue in full force and effect pending further order of this Court.

/s/ Burnita Shelton Matthews
United States District Judge

We consent:

/s/ Charles Patrick Ryan
Attorney for Plaintiffs

/s/ Gil Zimmerman
Assistant United States Attorney
Attorney for Defendant

Consent to Filing of Brief as Amicus Curiae by Frederick T. Zuber, et al.

[Filed February 16, 1967]

The plaintiffs, in conformity with the representations in their pleading filed herein opposing the motion of Frederick T. Zuber, et al., for intervention as defendants in this action, and in further conformity with their sub-

sequent oral representations concerning the filing of a brief as amicus curiae in behalf of Frederick T. Zuber, et al., hereby formally consent thereto, provided that the same will not further delay the hearing of the plaintiffs' motion for summary judgment, a copy of the excerpts from the administrative record concerning the nearby differential provision promulgated on October 1, 1964, being available to such applicants by virtue of the attached list of pertinent pages of said record that has heretofore been furnished by plaintiffs, and provided also that service of such brief is made upon plaintiffs' counsel in accordance with the rules of this Court.

CHARLES PATRICK RYAN
400 Prudential Building
Washington, D. C. 20005
ST 3-0004
Attorney for Plaintiffs.

Opposition to Plaintiffs' Motion for Summary Judgment

[Filed March 20, 1967]

Comes now defendant, the Secretary of Agriculture, by his undersigned attorneys, and respectfully opposes plaintiffs' motion for summary judgment on the following grounds:

1. Summary judgment should be denied since the challenged provisions of the Massachusetts-Rhode Island Milk Marketing Order (7 CFR Part 1001), involving the farm location differential have been expressly upheld as a valid exercise of the authority of the Secretary of Agriculture by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc.* v. *United States*, 108 F.2d 342 (C.A. 1, 1939). No facts have been set forth by plaintiffs in their motion for summary judgment which, in any manner, undermine the validity of the *Green Valley* decision, and, therefore, this Court should uphold the validity of the challenged provisions of the Massachusetts-

Rhode Island Milk Marketing Order on the basis of the Court of Appeals' ruling in the *Green Valley* case.

2. If the Court should feel that the *Green Valley* decision is not controlling and dispositive of the issues raised in the instant case, the Court should defer ruling on plaintiffs' motion for summary judgment on the ground that the issues raised are not ripe for adjudication under the doctrines of primary jurisdiction and exhaustion of administrative remedies. As heretofore set forth in papers filed with this Court by defendant, the provisions of the Massachusetts-Rhode Island Milk Marketing Order challenged in this case were originally issued as part of the Boston Milk Marketing Order in 1937. Since then, that order has from time to time been amended and consolidated with other marketing orders; the last effective determination and promulgation by the Secretary of Agriculture having been made on August 4, 1964 (29 F.R. 11205 *et seq.*). However, since August, 1964, the Secretary of Agriculture has commenced rule-making proceedings relating to the provisions of the Massachusetts-Rhode Island Milk Marketing Order and among the various proposed amendments to said order, there is a proposal (Proposal No. 40) which seeks to have the Secretary of Agriculture delete the challenged "farm location differential" provisions from the milk marketing order. In view of the fact that the challenged provisions of the Massachusetts-Rhode Island Milk Marketing Order have been in effect for nearly 30 years and have heretofore been expressly ruled valid by a United States Court of Appeals, and since the defendant Secretary has relied upon the judicially confirmed legality of the farm location differential provisions, this Court should defer ruling upon the validity of said provisions until the Secretary has had an opportunity to consider the matter in the pending rule-making proceedings relating to the Massachusetts-Rhode Island Milk Marketing Order. In this pending administrative proceeding, the Secretary of Agriculture will have an opportunity to give

due consideration to any intervening matters relating to the validity of the farm location differential provisions and in particular to the decision of the Court of Appeals for this Circuit in *Blair* v. *Freeman*, 370 F.2d 229, decided November 18, 1966. Defendant relies primarily upon *United States* v. *Ruzicka*, 329 U.S. 287 (1946); and *United States* v. *Lewes Dairy, Inc.*, 337 F.2d 827 (C.A. 3, 1964), *cert. denied*, 379 U.S. 1000, for his position that the Court should defer ruling upon plaintiffs' motion for summary judgment in the event this Court should find that the *Green Valley* decision is not controlling and dispositive of the issues presented in this case.

3. The farm location differential provisions of the Massachusetts-Rhode Island Milk Marketing Order, as issued on August 4, 1964, and as originally issued in 1937, are in accordance with law and are based upon evidence found in the record of various proceedings conducted by the Secretary of Agriculture in connection with the promulgation of the various provisions of the marketing order. The excerpts from various records before the Secretary of Agriculture, although not constituting the complete record in support of the challenged provisions, fully support the legality of the farm location differential provisions and plaintiffs in their motion for summary judgment have not demonstrated that the challenged provisions are not supported by the administrative record.

In support of this opposition, the Court is respectfully referred to the affidavit of Howard C. Feddersen, attached hereto, and the affidavits of Herbert L. Forest and Reuben Hall, previously filed by defendant in opposition to plain-

tiffs' motion for preliminary injunction, and the memorandum of points and authorities filed herewith.

Respectfully submitted,

BAREFOOT SANDERS
Assistant Attorney General

HARLAND F. LEATHERS
IRWIN GOLDBLOOM
Attorneys, Department of Justice
Washington, D. C. 20530
Attorneys for Defendant

Of Counsel:

JOHN G. LIEBERT
Attorney,
U. S. Department of Agriculture

[Filed March 20, 1967]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 3379-66

RUSSELL ALLEN, et al., *Plaintiffs*

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, *Defendant*

Affidavit

DISTRICT OF COLUMBIA } ss

Howard C. Feddersen, being duly sworn deposes and says:

The statements in this affidavit are based upon my personal knowledge or upon the records and publications of the United States Department of Agriculture.

1. Your deponent is now and has been since June 14, 1955, Deputy Director of the Dairy Division, Consumer and Marketing Service, United States Department of Agriculture, which division is responsible for the formulation and administration of the milk marketing order program, including Order No. 1, regulating the handling of milk in the Massachusetts-Rhode Island marketing area. I am a graduate of the University of Colorado, a graduate of the Law School of George Washington University, and a member of the District of Columbia Bar. In July 1934 I became a member of Consumer Counsel of the United States Department of Agriculture as an agricultural economist, specializing in regulatory functions of the Department concerned with dairying. In 1941 I became a member of the Dairy Division of the United States Department of Agriculture. I have been, since 1934, continuously

engaged in the milk marketing activities of the United States Department of Agriculture and in particular in the promulgation and administration of Federal milk orders.

2. The hearing records and public documents relating to farm location differentials, as the provisions appear in Order No. 1 regulating the handling of milk in the Massachusetts-Rhode Island order, are very voluminous and cover over 30 years in their scope. The first federal records dealing with adjustments in prices for milk produced nearest the metropolitan area of Boston were made in 1933 in relation to programs under the Agricultural Adjustment Act of 1933. These early records are available in their entirety only in the Archives. In 1935, this Act was amended so as to provide for marketing orders instead of licenses and the provisions of sections 5(A) and (B) of the Act were inserted in the Act at that time. In 1937, certain provisions, including sections 5(A) and (B), of the Agricultural Adjustment Act of 1933, as amended in 1935, were re-enacted and amended and denominated the Agricultural Marketing Agreement Act of 1937. The hearing records pertinent to the New England orders from 1935 to date are maintained by the Department of Agriculture. It is pursuant to the Agricultural Marketing Agreement Act of 1937 that the Massachusetts-Rhode Island Order No. 1 was promulgated in 1964, this order being a merger of the previously existing Southeastern New England, Springfield, Worcester and Boston orders. Each of these Orders had also previously contained substantially identical farm location differential provisions.

3. The records pertinent to the farm location differential provisions of the Massachusetts-Rhode Island Order include, not only the records made in 1963, but also the records made for each of the several orders which were merged into the Massachusetts-Rhode Island Order. All together these records are not only numerous but ex-

tremely voluminous. Time has not permitted a complete analysis and summary of the contents of each of these records for purposes of this proceeding.

4. As a result of a recent hearing held in June of 1966, the Department is presently engaged in preparing a recommended decision on several proposals one of which is to delete the farm location differentials from Order No. 1. Evidence available to the Secretary on this proposal is being analyzed and evaluated at this time.

5. For purposes of presenting to the Court some of the factors involved and reasons for farm location differentials, as well as their place in Marketing Order No. 1, certain excerpts from several of the above-mentioned hearing records have been selected and duplicated by members of my staff to be presented to the Court. They are attached hereto in two volumes as Exhibit "A" to this affidavit. Such excerpts are representative of the type and nature of the information relating to the economic factors involved in and the historical background relating to farm location differentials and their place in Marketing Order No. 1 as they were presented to the Secretary of Agriculture. These excerpts are not, however, complete, nor fully illustrative of all of the evidence before the Secretary. Their purpose is only to give the Court as clear an understanding as possible at this time of the facts bearing on the problem in issue.

H. C. FEDDERSEN
Howard C. Feddersen,
Deputy Director, Dairy Division, Consumer and Marketing Service

Subscribed and sworn to before me
this 20th day of March 1967.

/s/ AGNES STASEK
Notary Public

My commission expires 2-14-72.

Order Denying Applicants' Motion for Intervention

[Entered March 21, 1967]

Upon consideration of the applicants' motion for intervention as defendants herein and the plaintiffs' Opposition thereto, as well as the points and authorities and other papers filed herein and after hearing argument of counsel in open court, and it appearing to the Court that the application for intervention is not timely, in that the plaintiffs filed this action on the 27th day of December, 1966, and their motion for summary judgment on the 24th day of February, 1967, and it also appearing to the Court that the requested intervention will unduly delay the adjudication of this action, the applicants not having filed any proposed points and authorities in opposition to the said motion for summary judgment although the same were due on March 6, 1967, or shown any defense to the question of statutory authority involved herein or any grounds or defense other than those set forth or included in defendant's pleadings herein, and it also appearing that the requested intervention may prejudice the adjudication of the rights of the parties, in that defendant is responsible for the regulatory program involved and determinations in respect to the public interest, and it appearing that the defendant is adequately representing the validity of the regulation challenged herein and the interests of those milk producers who would be adversely affected by the invalidation of such regulation, it is by the Court this 21st day of March 1967,

ORDERED that the motion of the applicants, Frederick T. Zuber, et al., for leave to intervene as defendants in this action be and the same hereby is denied.

(Signed) BURNITA SHELTON MATTHEWS
Judge.

[Filed May 24, 1967]

Memorandum

The plaintiffs' motion for summary judgment is granted on the authority of *Blair, et al.* v. *Freeman,* U.S. App. D.C. , No. 19,801, decided November 18, 1966.

Counsel for plaintiffs will submit an appropriate order.

JOSEPH C. MCGARRAGHY
Judge

May 24, 1967

Affidavit in Support of Plaintiffs' Supplemental Points and Authorities

DISTRICT OF COLUMBIA, SS:

Charles Patrick Ryan, being first duly sworn, deposes and says that on May 12, 1967, he telephoned the Office of the Hearing Clerk, U. S. Department of Agriculture, and spoke to Mr. Eugene Meyer, Hearing Clerk, relative to the administrative hearing records that resulted in promulgation of the Worcester, Springfield and Southeastern New England federal milk orders; that the affiant was informed that the said records were being prepared for certification to the Court on Monday, May 15, 1967, and that said Office would also include the certified record of one of the orders for the Greater Boston area, the pertinent excerpts therefrom having been previously certified to the Court for the 2/9/26 and 8/1/37 Greater Boston orders. Affiant further states that such certification was of the entire record and that no question existed as to whether such records would be available, in that they were to be transmitted to defendant's attorneys that date, May 12, 1967.

/s/
CHARLES PATRICK RYAN

Subscribed and sworn to before me this 22nd day of May, 1967.

/s/
Notary Public, D. C.

[Filed June 15, 1967]

Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief

This cause came on for hearing on the Motion for Summary Judgment filed herein by the plaintiffs, and the Court having considered the Motion and Opposition thereto, the verified complaint, pleadings, affidavits, points and authorities, exhibits, and other papers filed herein, and having heard argument of counsel for each party and being fully advised in the premises in respect to the entire record, the orders entered herein, the pertinent portions of the administrative record, the arguments of the amicus curiae and former applicants for intervention, and all other considerations, the Court makes the following

FINDINGS OF FACT

1. The plaintiffs and their class are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the federal milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They have brought this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk order, which was promulgated by the defendant effective October 1, 1964, and is still in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location differential provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision by the defendant.

2. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located.

3. The nearby farm location differential payments are deducted from the equalization pool proceeds belonging in equity to all milk producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed. Reg. 5590, 29 Fed. Reg. 11213, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

4. The plaintiffs and their class are required by the operation and provisions of the said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

5. The plaintiffs and their class of ineligible milk producers constitute approximately 6,600 of the 8,800 milk producers serving the market, and there is no way that the said nearby differential payments may be recovered from the "nearby" milk producers by the plaintiffs and their class once such payments are made, in that the 8,800 milk producers are located in many different jurisdictions in various New England and other States and such attempts

at recovery would involve a multiplicity of parties and actions.

6. This action has been brought by the plaintiffs as a class action, that is as an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and market their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby farm location differential payments, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producer as a whole. The plaintiffs' class of non-eligible milk producers are so numerous that joinder of all members is impracticable. There are questions of law common to the class, and the claims of the plaintiffs as representative parties are typical of those of the class. The Court has found that the plaintiffs as representative parties will fairly and adequately protect the interests of their class of non-eligible milk producers, and it has entered an order herein authorizing the maintenance of this suit as a class action under Rule 23 (a) and (b) (2), FRCP. The Court has also found and entered an order herein that the defendant is adequately representing any interests of the eligible or "nearby" milk producers that would be adversely affected by the invalidation of the milk order provision, by virtue of the defendant's defense of the nearby farm location differential payments, and it has considered the arguments and defenses of the applicants for intervention as set forth in their pleadings and those of the defendant, including the defendant's motion to hold these proceedings in abeyance. The Court finds that both the plaintiffs and the defendant have adequately represented the interests of the respective classes of ineligible and eligible milk producers, and this judgment includes in its application the said two classes of milk producers, those whose farms are so located as to make them either eligible or ineligible for the nearby farm location differential payments of the milk order.

7. On January 16, 1967, pursuant to the motion of the plaintiffs, this Court entered an order granting a preliminary injunction during the pendency of this action or until further order of the Court enjoining the defendant from paying over to the eligible class of milk producers the monies representing the contested nearby farm location differential payments of the said milk order and requiring that the defendant collect, place and retain the monthly sums that would otherwise be paid over under said order provision in an escrow account subject to the control of the Court. On March 17, 1967, the said preliminary injunction was modified by a consent order to allow the disbursement from said escrow account of those monies therein attributable to the marketings of milk of the nearby or eligible class of milk producers and for the future payment to them of the said amounts that would otherwise be escrowed except for such modification of the preliminary injunction. The defendant is required by the terms of such order to make monthly reports concerning the escrow deposits and to furnish the same to the Court and to the plaintiffs' attorney, but it has failed to do so since its report pertaining to the said nearby differential payments attributable to the marketing of milk during January, 1967. The monies in the said escrow account presently consist of those withheld from the ineligible or non-nearby milk producers by virtue of the aforesaid reduction in the uniform blended price which they would otherwise receive for their milk except for the said nearby differential provision.

8. On March 21, 1967, this Court denied the motion of Frederick T. Zuber, et al., for leave to intervene herein as defendants, and the applicants' motion for summary reversal of said order of this Court was denied by the United States Court of Appeals for the District of Columbia Circuit on May 5, 1967, "without prejudice to such action as the appellants may be advised to take following final judgment in the District Court where so far as presently appears there will have been accorded to those appellants by

such judgment such recognition of their claims as they may be entitled to receive;". The said Order of the Court of Appeals further stated that the denial of their motion did not constitute a bar to renewing the motion for the purpose of showing in what respect the defendant failed to adequately represent the appellants' interests in the District Court. The proceedings in the Court of Appeals in respect to the appellants' appeal of said Order denying intervention were suspended pending decision of this Court on the plaintiffs' motion for summary judgment, in respect to designation of the record to be printed and the filing of briefs, for a period of twenty days from the date of the ruling of this Court on said motion. Said Order of the Court of Appeals of May 24, 1967, suspending the proceedings in that Court as aforesaid was unopposed by the plaintiffs, who filed a formal consent herein to the filing of a brief amicus curiae by Frederick T. Zuber, et al., for the presentation of any defense or argument that they might desire to place before this Court and who furnished the said applicants with a designation of the page references of the administrative record relating to the nearby farm location differential. The said applicants did not avail themselves of the opportunity to file such a brief in this Court as proposed by the plaintiffs or file any other response thereto, although the same local law firm that represented the applicants Frederick T. Zuber, et al., did file such a brief as local counsel for the Commonwealth of Massachusetts with the consent of plaintiffs on the 15th day of May, 1967, the day prior to the hearing on the plaintiffs' motion for summary judgment.

9. On November 18, 1966, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in the case of *Lorton Blair, et al.* v. *Orville Freeman, Secretary of Agriculture of the United States,* No. 19,801, ... U.S. App. D.C. ...., 370 F.2d 229, in which it held that the nearby farm location differential provision of the New York-New Jersey federal milk marketing order,

7 C.F.R. 1002.71(b) was unauthorized and void, and it ordered the reversal of the decision of the District Court, C. A. No. 498-65, and the granting of a judgment declaring the invalidity of said milk order provision and the issuance of a permanent injunction against its continued enforcement by the defendant. The time for petitioning the Supreme Court of the United States for the issuance of a writ of certiorari has expired in said case. There is no substantial difference between the operation of the nearby farm location differential provision of the New York-New Jersey milk order declared invalid and void in the case of *Blair* v. *Freeman,* supra, and that of the Massachusetts-Rhode Island milk order contested in this action. Both provide for the nearby differential payments from the equalization pool proceeds through reduction of the uniform blended price, and the said payments to the nearby or eligible milk producers reduce pro tanto the amount which the plaintiffs and their class would otherwise receive for their milk under the respective milk orders.

10. On the authority of *Blair* v. *Freeman,* supra, the Court finds that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, is invalid and void as being in excess of the statutory power of the defendant Secretary of Agriculture, in that the said differential is not one of the adjustments to the uniform blended price authorized under the Agricultural Marketing Agreement Act of 1937, as amended, and constitutes a diversion of that portion of the uniform blended price represented by said differential to which the plaintiffs and their class are entitled under the said Act. The said nearby differential provision does not constitute the adjustments authorized under either 608c(5)(b)(ii) (a) or (c) of the Act, nor is it authorized under 608c(7) of the Act as incidental, consistent and necessary in respect to the other terms and conditions of the Act. The said nearby differential payments to the eligible milk producers are determined on the basis of the location of their farms and are

not authorized as production or market differentials under the Act. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935). Nor does eligibility for such nearby differential payments turn on the location at which delivery of the milk is made, but solely on the location of the farms in the areas designated in Section 1001.72 of the milk order.

As in *Blair*, the differential involves considerations involving the use of milk of the eligible "nearby" milk producers and the payments thereof are also geared to the use of fluid milk, thus violating the prohibitions of the Act concerning payment to all producers of a uniform price for their milk irrespective of use thereof. For these and the other reasons stated in *Blair*, the nearby farm location differential provision of the Massachusetts-Rhode Island milk order is invalid and void. The Court has fully considered the other claims and defenses of the defendant, the amicus curiae, and the applicants for intervention herein, including that claim of Frederick T. Zuber, et al., applicants for intervention, that invalidation of the nearby differential by this Court would deprive nearby milk producers of property without due process of law and concerning the alleged non-separability of the provisions of the milk order, Section 1001.96, and the Court finds that the same do not constitute a basis for denial of the plaintiffs' motion and the relief requested in their complaint. Further, the Court has found that the plaintiffs and their class are sustaining irreparable injury by virtue of the nearby differential payments and that the issues presented are properly those for judicial determination.

Now, Therefore, the Court makes the following

Conclusions of Law

1. The plaintiffs and their class are entitled to the granting of the motion for summary judgment filed herein by them on the 24th day of February, 1967.

2. The plaintiffs and their class are entitled to the relief requested in their complaint, namely declaration of the invalidity of Section 1001.72 of the Massachusetts-Rhode Island milk order and a permanent injunction against its continued enforcement by the defendant, in order to preclude further irreparable injury to them, and they have no adequate remedy at law.

ORDER

WHEREFORE, it is by the Court this 15th day of June, 1967,

ORDERED, that the motion for summary judgment filed herein by the plaintiffs and their class be and the same hereby is granted, and it is further

ORDERED, ADJUDGED and DECREED, that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, be and the same hereby is declared invalid and void, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant Secretary of Agriculture, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, attorneys, servants and employees, and all persons in active concert or participation with them, be and they hereby are restrained and enjoined from enforcing the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, Section 7 C.F.R. 1001.72, at any time in the future under the same or any other name or designation, either directly or indirectly, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant take all necessary action to effectuate the required termination of the operation of said milk order provision, and it is further

ORDERED, that the defendant, his Market Administrator for the Massachusetts-Rhode Island milk marketing area,

their agents, employees, attorneys and servants, comply with the orders of this Court of the 16th day of January, 1967, and the 21st day of March, 1967, requiring that a separate report be filed with the Court and furnished to plaintiffs' counsel, Charles Patrick Ryan, 400 Prudential Building, Washington 5, D. C., concerning the information relating to deposits of the differential payments in the escrow fund established under the control of this Court, for those months for which such a report was not filed or furnished, to and including the report relating to the milk delivered during the month of April, 1967, the said reports to be filed and furnished on or before the 30th day of June, 1967, and it is further

ORDERED, that the defendant and his said Market Administrator retain the monies representing the nearby differential payments deposited in the said escrow fund pending further order of this Court to be entered concerning distribution of the said fund after compliance with the filing and furnishing of the said monthly reports as aforesaid and after a ruling by the United States Court of Appeals for the District of Columbia Circuit in respect to the appeal of Frederick T. Zuber, et al., No. 20,931, of the Order of this Court denying them intervention in this action, dated March 21, 1967, said appeal being presently pending in the Court of Appeals.

JOSEPH C. McGARRAGHY
District Judge.

[Filed July 5, 1967]

ORDER

[of Court of Appeals for D.C. Circuit, Dkt. No. 20,931]

These appellants having heretofore appealed from the District Court's denial of their motion to intervene and having thereupon moved for summary reversal and this court having entered its order of May 5, 1967 denying the motion for sum-

mary reversal but having noted that our order was without prejudice and that the appellants might receive in the District Court all relief to which they could be said to be entitled;

and the District Court having on the 15th day of June 1967 entered its order granting summary judgment in favor of the appellees basing its judgment on *Blair v. Freeman*, ___ U.S. App.D.C. ___, 370 F.2d 229 (1966), no review having been sought;

and it having appeared that the Department of Justice contemplates no effort to stay the District Court's judgment and that the Secretary has until August 14th within which to perfect an appeal;

and these appellants having now sought to stay the effect of the order of the District Court following summary judgment, and it having appeared to the satisfaction of the court that although there is no reason to believe that the interests of appellants were not adequately represented in the District Court proceedings, it is not clear that those interests will receive the protection of appellate review, and on that account that those appellants should be entitled to be admitted as intervenors in the action in the District Court for the purpose, if they be so advised, of prosecuting an appeal from the judgment of the District Court;

and this court being further of the view that no such showing has been made as would entitle those appellants to an order staying the effectiveness of the District Court's judgment;

Now, upon consideration of the foregoing, the memoranda filed by the Commonwealth of Massachusetts and the State of Connecticut, respectively, as amici curiae, the motion for stay filed by those appellants, the opposition thereto, and after oral argument, and on the record of proceedings in the District Court, judicial notice of which has been taken,

It is by the court ORDERED:

(1) The motion for stay of the effectiveness of the District Court's order is denied;

(2) That this court's order of May 5, 1967 is vacated;

(3) The District Court is directed to grant the motion of those appellants for leave to intervene for the purpose of prosecuting an appeal from the judgment of the District Court entered June 15, 1967;

(4) The appellants are directed to inform the court within 15 days following allowance of their motion to intervene in the District Court whether or not they intend to prosecute an appeal from the judgment and if they shall decide to do so, the parties shall work out with the Clerk of this court an expedited briefing and hearing schedule and the appellants' appeal in No. 20931 will thereupon become moot;

(5) The order of this court herein shall be without prejudice to such order as the District Court shall find itself advised to enter respecting preservation of the status quo pending appeal or the further order of this court.

Per Curiam

[Filed July 7, 1967]

ORDER

This Court, having on the 15th day of June, 1967, entered an order granting summary judgment (McGarraghy, J.) in favor of the plaintiffs;

and the Court of Appeals, having on the 5th day of July, 1967, entered an order directing this Court to grant the motion of the applicants for intervention, Zuber, *et al.*, for the purpose of prosecuting an appeal from the said judgment of this Court;

and this Court, having executed an order on this day of July, 1967, granting such intervention;

and the intervenors, having requested of this Court in chambers, at which both plaintiffs and defendant were present by counsel, that the status quo be preserved temporarily pending

the earliest possible full hearing before Judge McGarraghy of this Court on a motion by intervenors to preserve the status quo pending disposition of the appeal noted by intervenors from the order granting summary judgment;

and the Government, having supported the request of intervenors for such temporary action by this Court pending the earliest possible full hearing before Judge McGarraghy of this Court;

and recognizing that the preservation of the status quo simply requires continuation of payments into an escrow account already established by order of this Court pending such further action as this Court may take;

Wherefore, it is by the Court this 7th day of July, 1967,

ORDERED, that, pending further order of this Court, the status quo in this matter shall be preserved; and

ORDERED, that the net amount of the nearby farm location differential provided for in the Massachusetts–Rhode Island milk order, 7 C.F.R. 1001.72, which under the June 15, 1967 order of this Court would be paid to plaintiffs and the class which they represent shall continue to be deposited in an escrow account in the registry of this Court in accordance with the terms set forth in the preliminary injunction of this Court entered on January 16, 1967, as modified by this Court on March 17, 1967.

/s/ Joseph C. Waddy
District Judge

July 7, 1967

[Filed July 7, 1967]

ORDER GRANTING INTERVENTION

On consideration of the order of the United States Court of Appeals in the case of *Zuber, et al. v. Allen, et al.*, dated July 5, 1967, in which it is provided:

> "The District Court is directed to grant the motion of these appellants for leave to intervene for the pur-

pose of prosecuting an appeal from the judgment of the District Court entered June 15, 1967;"

it is

ORDERED, that Frederick T. Zuber, George R. Medeiros, Herbert Kallmann, Alexander F. Tripp, John T. Savage, Kendall F. Crocker, II and Carl W. Proctor, Applicants for Intervention, are hereby granted leave to intervene as defendants for the purpose of prosecuting an appeal from the "Order Granting Motion for Summary Judgment & Judgment for Declaratory and Injunctive Relief," dated June 15 1967.

/s/ Joseph C. Waddy
Judge

July 7, 1967

[Filed July 19, 1967]

MOTION FOR ORDER PRESERVING EFFECTIVENESS OF JUDGMENT AND FOR DEFENDANT AND OTHERS TO SHOW CAUSE CONCERNING NONCOMPLIANCE THEREWITH

Plaintiffs respectfully represent to the Court as follows:

1. On June 15, 1967, this Court (McGarraghy, J.) signed and entered an order granting the plaintiffs' motion for summary judgment, stating additionally therein as follows:

"ORDERED, ADJUDGED and DECREED, that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, be and the same hereby is declared invalid and void, and it is further

"ORDERED, ADJUDGED and DECREED, that the defendant Secretary of Agriculture, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, attorneys, servants and employees, and all persons in active concert or participation with them, be and they hereby are restrained and enjoined from enforcing the nearby farm location differential

provision of the Massachusetts-Rhode Island milk order, Section 7 C.F.R. 1001.72, at any time in the future under the same or any other name or designation, either directly or indirectly, and it is further

"ORDERED, ADJUDGED and DECREED, that the defendant take all necessary action to effectuate the required termination of the operation of said milk order provision * * * *".

2. Prior to June 15, 1967, the defendant had submitted a proposed order and objected to that submitted by the plaintiffs, further requesting that the Court's order and judgment be stayed pending any appeal that might be taken by the defendant. The plaintiffs opposed such request for a stay and the Court's order and judgment was not stayed. Thereafter, Frederick T. Zuber, et al., applicants for intervention as defendants in the District Court and appellants in the Court of Appeals in respect to denial of their motion to intervene, moved the Court of Appeals for a stay of this Court's order and judgment of June 15, 1967, granting plaintiffs' motion for summary judgment. After a hearing on July 3, 1967, the Court of Appeals issued an order on July 5, 1967, stating therein:

"(1) The motion for stay of the effectiveness of the District Court's order is denied; * * *

"(5) The order of this court herein shall be without prejudice to such order as the District Court shall find itself advised to enter respecting preservation of the status quo pending appeal or the further order of this court."

The said order of the Court of Appeals also directed the District Court to grant the motion of Frederick T. Zuber, et al., for leave to intervene "for the purpose of prosecuting an appeal from the judgment of the District Court entered June 15, 1967", the Court stating that "it is not clear that those interests will receive the protection of appellate review" and noting that "the Secretary has until August 14th within which to perfect an appeal". The defendant has not noted any appeal as yet, although plaintiffs' counsel is informed that he intends to do so.

3. On June 27, 1967, defendant's Deputy Administrator, Regulatory Programs, signed a recommended decision and a recommended order amending the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001, relating to administrative hearings held in 1966, and the said recommended decision and order was published on July 6, 1967, in the Federal Register at 32 F.R. 9902. In his recommended decision at pages 9918-21, the issue of "farm location differentials" is presented and it is stated that "The farm location differential provisions under the Massachusetts-Rhode Island order should be continued". A discussion of the "history" of the differential is set forth with "findings" relating to alleged evidence presented in hearings held 30 years ago, which "findings" are not those set forth in the 1936 and 1937 orders, the latter referring to the use of nearby producers' milk for fluid use purposes. The matters referred to in said recommended decision were all presented to the District Court during this case, and the defendant presumably is still attempting to rectify the lack of valid findings made during the promulgation of the Massachusetts-Rhode Island order in 1964. After discoursing on the various legal points raised by defendant in this case and an alleged distinction between this case and the *Blair* case, the recommended decision states as follows:

> "We do not, of course, by our *present* findings in the matter intend to ignore or circumvent in any way the recent decision of the District Court in the Allen case. In the present circumstances and pending final disposition of the Allen case in such appellate proceedings as may be taken, in furtherance of our authority and responsibility under the Act we are constrained to state our full views in the matter."

In another part of the recommended decision, the defendant proposes the enlargement of the marketing area and that the order be designated the "Massachusetts-Rhode Island-New Hampshire" milk marketing order. After the filing of exceptions by July 26, 1967, the recommended decision states that the provisions of the recommended order shall become effective at such time as the Secretary might declare the same.

4. The order of this Court declaring the invalidity of the nearby differential and the injunction enjoining the enforcement of the nearby differential at any time in the future under the same or any other name or designation, either directly or indirectly, was in force as of June 15, 1967, as was the Court's order for effectuation of the termination of the operation of the differential. Plaintiffs submit that the action of the defendant or his agents constitutes an acknowledged non-recognition of this Court's order and judgment of June 15, 1967. They also submit that defendant or his agents intend to further violate the same by the promulgation of a "new" order provision, thereafter contending that the latter is in effect by virtue of the "present findings" and such amended order, and that reinstitution of the present legal proceedings is necessary under such circumstances. The recommended decision reflects not only the contention that this Court is in error, but that defendant or his agents may determine the limits of the Secretary's statutory authority and proceed to act solely in conformity with such self-made interpretation irrespective of the orders of this Court. Plaintiffs contend that possible appellate proceedings do not constitute justification for ignoring or violating of the Court's order and judgment, and that the action taken and impending is within the prohibitions of said order and judgment. Such action also constitutes irreparable injury to plaintiffs and their class, and is not embraced within the subsequent order of Judge Waddy temporarily preserving the status quo until a full hearing on the question of a stay, motion for such relief to be filed herein by Frederick T. Zuber, et al., in the near future.

WHEREFORE, plaintiffs respectfully request:

1. That defendant, his agents, attorneys, servants, and employees be required to obey the order and judgment of this Court of June 15, 1967, by issuance of a restraining or other order, or other appropriate means, and that the decision to be issued by defendant or his agent eliminate the aforesaid discussion and "findings" relative to the nearby farm location differential, except for such reference as may be necessary and in conformity with this Court's order and judgment.

2. That defendant, his agents, attorneys, servants, and employees be required to show cause, if any they have, concerning noncompliance and intended future noncompliance with the order and judgment of this Court of June 15, 1967, concerning issuance of any "new" order provision differential,

3. And for such other relief as may be appropriate.

[Subscription Omitted in Printing]

[Filed July 24, 1967]

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER PRESERVING EFFECTIVENESS OF JUDGMENT AND FOR DEFENDANT AND OTHERS TO SHOW CAUSE CONCERNING NONCOMPLIANCE THEREWITH

Defendant, by his undersigned attorneys, respectfully opposes plaintiffs' Motion for Order Preserving Effectiveness of Judgment and for Defendant and Others to Show Cause Concerning Noncompliance Therewith on the grounds that it is wholly lacking in merit, is without foundation or substance and is patently frivolous.

The burden of plaintiffs' motion is that the Deputy Administrator, Regulatory Programs, Department of Agriculture, issued a Recommended Decision (32 F.R. 9902 et seq.), relating to the Massachusetts-Rhode Island Milk Marketing Order pursuant to the responsibilities of the Department of Agriculture under the Agricultural Marketing Agreement Act, as amended, 7 U.S.C. 601 et seq., and that in the course of discussing a proposal to delete the farm location differential from the order failed to recognize this Court's order and judgment of June 15, 1967. Plaintiffs' contention is wholly without merit. Defendant has previously advised the Court of the pendency of administrative proceedings relating to a variety of proposals to amend several provisions of the Massachusetts-Rhode Island Milk Marketing Order. In carrying out the responsibility of the Department of Agriculture in connection with such quasi-legis-

lative administrative proceedings, the Department of Agriculture issued its Recommended Decision relating to the various proposals which had been pending before it for several months. The discussion of the proposals covers some twenty-one pages in the Federal Register. The discussion of the farm location differential considers the various aspects of the differential in the light of the specific proposal to delete the provision from the marketing order. Thereafter, the Recommended Decision specifically states that there is no intention to ignore or circumvent in any way the decision of this Court in this proceeding but simply to state the views of the Department. 32 F.R. 9920. Thus the Recommended Decision, insofar as is here relevant, only sets forth, as required by the Agricultural Marketing Agreement Act of 1937, as amended, and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 C.F.R. Part 900), the decision of the Secretary based upon the record before him in connection with the proposal to delete the nearby differential from the Massachusetts-Rhode Island Milk Marketing Order.

Plaintiffs' motion completely fails to set forth any facts or circumstances which demonstrate in any way the failure by the Secretary to comply with the orders of this Court. Without such facts, plaintiffs' motion is without any merit. In these circumstances, plaintiffs' motion should be denied.

[Subscription and certificate of service omitted in printing]

[Filed August 18, 1967]

OPPOSITION TO MOTION ENTITLED "MOTION FOR PRESERVATION OF STATUS QUO PENDING APPEAL OF ORDER OF SUMMARY JUDGMENT DATED 6/15/67 AND FOR OTHER RELIEF" FILED HEREIN BY DEFENDANT INTERVENORS.

The plaintiffs respectfully say as follows concerning the motion of the defendant intervenors:

1. The defendant intervenors, through the New England Milk Producers Association and other cooperative associations representing "nearby" milk producers, attempted to intervene in this case in early January, 1967, shortly after the action was filed, and many of the same arguments concerning "irreparable" injury to nearby producers were made at that time by the same attorneys who presently represent the defendant intervenors, as well as by the defendant Secretary who supported the validity of his nearby differential provision and the position of the defendant intervenors. Despite such arguments concerning the one-sided view of the status quo, the Court (Matthews, J.) entered a preliminary injunction in recognition of the irreparable injury being sustained by the plaintiffs and their class, many of whom have been and are being forced out of business by lack of a decent return for their milk and who could continue in business in many instances if they did not have the differential payments extracted from them, and the Court also denied the motion to intervene of the New England Milk Producers Association. The Court noted the prejudicial attempt to enter the case by the Association to represent all of its members, most of whom are non-nearby producers in the plaintiffs' class and several of whom are individual plaintiffs herein, and it is not difficult to perceive that this action and the basic rights of the plaintiffs and their class would have been totally compromised if the Court had been deceived by these representations and request for intervention for such purpose. The said Association, instigator of the nearby differential years ago, also made the same argument as that of the present individual defendant interve-

nors and their same counsel, in respect to remand for administrative determinations, etc., because the said Association would speak for its non-nearby members at any administrative hearing and would also vote for them concerning any Decision by the Secretary. In view of the fact that both the Association, or rather the minority block that runs it, and the defendant Secretary both support the nearby differential payments of about $150 per month to the large nearby producers, it is apparent that the Court was being asked to partake in a nullification of the rights of the plaintiffs and their class, including the basic right to bring a legal action through counsel of their choice and in the forum of their choice. The defendant intervenors and their counsel were not content at that time to seek intervention for themselves, but they attempted to enter the proceedings to oust the plaintiffs and their class from their only remedy. This conduct must be considered by a court of equity when application is made to it for relief, especially when that relief would aggravate the irreparable injury being sustained by plaintiffs and their class. The Court is respectfully referred to the papers filed by such applicants (Associations) for intervention prior to the hearing on the plaintiffs' motion for preliminary injunction, the affidavits filed by their counsel and the defendant which state that plaintiffs and their class have accepted the propriety of the differential and have voted in favor of it, and to the representations made to the same effect on the hearing for preliminary injunction. These actions preclude the granting of any equitable relief, and further evidence of the lack of consultation of the Association with its rank and file members is reflected in the attached excerpts from the administrative hearing that resulted in promulgation of the nearby differential, attached hereto as Exhibit "C" and made a part hereof, the cavalier attitude displayed at said hearing conflicting with the representations made to the Court by counsel:

> "The individual producers in the zones that do not receive these nearby differentials have been consulted and to the extent they have been consulted (and they have been consulted in substantial numbers) they take

> the position that they want the Order as it presently stands to continue in effect and if there is any desire to modify the order, that is the rate differentials as presently expressed in the order, that proposition can be presented to the Secretary at the appropriate time in an administrative hearing when evidence can be presented in such hearing for the Secretary's consideration in due course, and his ultimate decision." (p. 4-6, Hearing of Jan. 11, 1967).

The plaintiffs and their class could not be represented by counsel for defendant or applicants for intervention as defendants, and the Court disposed of this inequitable contention in short order.

2. After denial of intervention, a request was made to the Secretary to suspend the nearby differential during the pendency of the legal proceedings, an action that would have precluded the escrowing of the contested differential payments, since such payments were necessarily contingent upon the continued operation of the nearby differential provision. The purpose of the requested suspension was to enable nearby producers to obtain their 12 cents per cwt. that was being escrowed along with the identical amount of non-nearby producers' monies. Such suspension would have also resulted in the payment to plaintiffs and their class of their 12 cents per cwt., since no monies could have been escrowed under the suspended differential provision. Such payments to plaintiffs' class would have been admittedly "irretrievable", and the defendant intervenors were willing to sustain this "irreparable injury" in order to get their own monies of 12 cents per cwt. and to prevent their escrowed portion from possibly being forfeited in damages for past differential payments, the statement in *Blair* about picking and choosing nearby producers from whom to demand financial redress being inappropriate when the monies of all nearby producers were in a single fund against which such claims could have been made by plaintiffs' class. The requested suspension is a complete acknowledgement of lack of real "irreparable" injury, since it actually constituted a request to pay to the plaintiffs' class those monies of the

plaintiffs' class which the defendant intervenors ask this court to escrow. Such inconsistent representations also bear on their right to presently ask this Court for equitable relief, especially in view of the fact that the nearby differential has been ruled illegal and the plaintiffs' class continues to sustain irreparable injury because of non-receipt of their monies.

3. After the Secretary denied the request for suspension during the entire time that the case would be in the courts, the plaintiffs suggested a modification of the preliminary injunction, upon considerations of equity, that would allow not only the disbursement of that portion of the nearby producers' monies in escrow but also the receipt by them of their 12 cents per cwt. in the future without escrowing thereof. This was more than that which they sought by suspension of the differential, and it also assured them that their escrowed monies would not be forfeited as damages, such monies of nearby producers being "irretrievably" lost to the plaintiffs' class by virtue of their equitable action. In appreciation thereof, the defendant intervenors have sought to continue the escrowing of the 12 cents per cwt. that is taken from out of the pockets of the plaintiffs' class each month. The District Court denied on March 21, 1967, the motion of the defendant intervenors for leave to intervene, and they were only granted the right to intervene for the purpose of prosecuting an appeal from the order of this Court granting summary judgment because "it is not clear that those interests will receive the protection of appellate review", the Circuit Court noting in No. 20,931 that it has appeared to the satisfaction of the Court that "there is no reason to believe that the interests of the appellants were not adequately represented in the District Court proceedings". The present defendant intervenors had filed a motion for a stay of the judgment of this Court, and the Circuit Court stated as follows in its order (Exhibit "D" made part hereof) of July 5th:

> ". . . this court being further of the view that no such showing has been made as would entitle these appellants to an order staying the effectiveness of the District Court's judgment;

Now, upon consideration of the foregoing, the memoranda filed by the Commonwealth of Massachusetts and the State of Connecticut, respectively, as amicus curiae, the motion for stay filed by these appellants, the opposition thereto, and after oral argument, and on the record of proceedings in the District Court, judicial notice of which has been taken,

It is by the court ORDERED:

(1) The motion for stay of the effectiveness of the District Court's order is denied;".

4. The defendant intervenors' counsel secured a copy of the foregoing Order of the Circuit Court in the early afternoon on July 5th, date of the Order, and advised counsel for the plaintiffs' class of said order the next morning and that he was going to appear that morning as a preliminary matter before the motion's judge concerning continuation of the escrowing of the monies originating from plaintiffs' pockets, the defendant intervenors now referring to the escrowed payments as the "net" differentials. Plaintiffs' counsel advised that he had not received a copy of said Order, knew nothing about it, and had other obligations that prevented him from appearing in motion's court that morning, requesting that he be given an opportunity to read the Order and that defendant intervenors' counsel wait until the following morning to take any action. Such request was refused, and plaintiffs' counsel was not thereafter advised by defendant intervenors that the motion's judge had not heard them that date or that they would reappear for such relief the following morning before the motion's clerk as a preliminary matter, plaintiffs' counsel being informed by defendant intervenors that Judge McGarraghy might come back from vacation to hear the motion. Plaintiffs' counsel nevertheless appeared in motion's court the following day when he observed the defendant intervenors' counsel ready to proceed in said Court. It was under these circumstances and for reasons known to defendant intervenors that plaintiffs' counsel "consented" to the temporary order entered by the motion's judge on July 7th. Counsel did not consent for the purpose of allowing defendant intervenors

to claim that the same constituted an acknowledgement of consent for the future, and it was also counsel's understanding that Judge McGarraghy was to return on August 1st instead of August 16th, the crucial date being the 12th in respect to the escrowing of the payments. Neither the defendant intervenors or their counsel can urge equitable considerations upon the Court as a basis for granting the requested relief, for these entire proceedings reflect a lack of equity on their part which violates every true concept of the term.

5. The defendant intervenors also claim that they are making arguments in the appellate court which were not made in the District Court because of their lack of participation herein, but the record reflects that they and their counsel were involved in the proceedings in one form or another from the commencement of the action. Further, the plaintiffs' counsel wrote to counsel for defendant intervenors on March 15, 1967, (Exhibit "A-1", made a part hereof) upon receipt of notice from the District Court that their application for leave to intervene as defendants had been denied, stating therein:

> "It would be appreciated if you would advise me as soon as possible concerning whether you desire to file a brief as amicus curiae in the proceedings in behalf of your clients."

Even after the Circuit Court had denied the motion of defendant intervenors for summary reversal of the District Court's order denying intervention, plaintiffs' counsel wrote another letter on May 8th (Exhibit "A-2" made a part hereof) to opposing counsel asking if defendant intervenors would then like to file a brief amicus curiae concerning the plaintiffs' motion for summary judgment, having also filed a formal Consent thereto herein with a Designation of all of the pertinent page records of the administrative hearing record that related to testimony concerning the nearby differential. The defendant intervenors' counsel and that of the Government claimed at that time that the administrative record was not available, which inaccurate statement was repeated on the hearing for summary judgment, and they now state that they will present arguments concerning evidence in the administrative record

that was not urged upon this Court, as well as other allegedly new arguments. It is apparent from the record herein that both the defendant and the defendant intervenors had every opportunity to present every possible argument to this Court, (Exhibit "B", letter of April 20, 1967, to defendant counsel made part hereof) the plaintiffs' motion for summary judgment having been filed herein on February 24th, approximately three months before the hearing thereon. They are thus precluded from such arguments that might have been advanced herein, and also from any equitable relief because of the misrepresentations made as a basis for such request.

6. There is little likelihood of the defendant intervenors' prevailing on appeal, and this has been accepted as a practical matter by all the involved organizations and associations connected with the milkshed, price forecasts even carrying a revised amount (increased) because of the present litigation, the outcome being an accepted fact in virtually all quarters. The defendant intervenors have filed their brief on appeal in which they attempt to justify the nearby differential as a "conglomerate" differential, being unable to find a statutory basis in the enumerated adjustments and actually attempting an amendment of the Act. The nearby differential has been declared unauthorized and void by this Court, and both the Government and present counsel for defendant intervenors argued in the *Blair* case that the nearby differential involved in *Blair* and in this case were identical, the briefs being filed as exhibits herein to the plaintiffs' motion for summary judgment. Equitable considerations and the related doctrine of estoppel would hardly allow them to reverse their position to inconsistently claim that they are now distinct in every respect. In this connection, the defendant intervenors have designated only a fraction of the record necessary for a review by the appellate court, and they have forced the plaintiffs to undergo the financial burden of their appeal. They have refused to print clearly relevant pleadings, except in a separate part of the joint appendix, refused to print cross-examination of the testimony of their witnesses unless plaintiffs paid for the same and only agreed to print it in sequence after plaintiffs' filed an appro-

priate motion with the Circuit Court. Thereafter, defendant intervenors wrote to plaintiffs' counsel stating that they would print at their expense all designations of the administrative record, the same being their main reliance on appeal. After plaintiffs' counsel filed a motion to withdraw his aforesaid motion, he was then informed by counsel for defendant intervenors that plaintiffs would have to have important parts of their designated administrative record testimony printed at plaintiffs' expense. These tactics hardly befit one seeking equitable relief.

7. The climax of the argument of the defendant intervenors made to this Court for equitable relief is that they are claiming that the escrowed funds should be paid to them even if the Circuit Court agrees that the nearby differential is illegal, this argument being made on "equitable" grounds that they have been paid such differential payments by plaintiffs' class "for 30 years", even though the Massachusetts-Rhode Island milk order was not promulgated until late 1964. This argument is the essence of inequity, especially since they and the defendant have urged all through these proceedings, upon which plaintiffs have relied and acted, that the escrowing of the monies extracted from plaintiffs class and the preliminary injunction afford "protection" to plaintiffs' class. The defendant intervenors want the escrowed monies belonging to the plaintiffs even if the differential is illegal, and the plaintiffs ask "Where is the equity on the part of defendant intervenors or the Government in any part of these proceedings?" They have received more than that to which they are entitled, but they mistake the equitable considerations that have motivated the plaintiffs for an endless imposition upon them that aggravates the injury the plaintiffs continue to sustain because of the initial and continuing inequitable conduct of a few producers who would fatten on their fellow dairymen's injury. The District Court refused to recognize that defendant intervenors represented the class of nearby producers, for it would be unjustly stigmatizing the great majority of such producers to say that these few individuals represented the thinking of the same, in that only a small minority in

every field are desirous of injuring their fellow man. Additionally, the nearby producers receive differential payments of direct delivery and transportation in significant amount over and above the price received by non-nearby producers. The nearby producer can also receive the nearby differential payments from handlers if their milk has any additional value over that of the non-nearby producers, since the price set by the Order is a minimum price, and this is their claim for the nearby differential—that their milk has additional value to the handler. If so, it is evident that they can sustain no true irreparable injury, for such handlers can pay them twice the amount of the nearby differential if their claim is true.

It is evident that no valid basis exists for continuing the escrowing of the plaintiffs' monies or perpetuating the irreparable injury to them, and it is also clear that the defendant intervenors are not entitled to urge such request for equitable relief upon this Court, their own action herein disentitling them to even make such claim therefor. In view of the fact that the plaintiffs prevailed in the District Court, it is apparent that the defendant intervenors should be required to give such bond as would protect the plaintiffs' class during the remainder of this proceeding, in that plaintiffs' class are unable to utilize the escrowed funds that are urgently needed by them to even stay in business in some instances. In view of the inequitable request of defendant intervenors, the plaintiffs class hereby request that the modified preliminary injunction be modified so as to again require the escrowing of the monies previously originating from the nearby producers and that plaintiffs' class be allowed to file claims against the total amount of the same for recovery of past damages if they ultimately prevail herein, or that the requested bond extend in like amount to such sums which have been or otherwise would have been deposited in escrow except for such modification of the preliminary injunction and the release of nearby producers monies from escrow or future escrowing, and that the motion of defendant intervenors' be denied in all respects.

[Subscription Omitted in Printing]

[Filed Oct. 13, 1967]

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS

September 5, 1967

[1] The above-entitled cause came on for hearing before The Honorable JOSEPH C. MC GARRAGHY, Judge of the United States District Court for the District of Columbia at 10:30 A.M.

Appearances:

In behalf of the Plaintiffs:

CHARLES P. RYAN, ESQ.

In behalf of the Defendant:

IRVIN GOLDBLOOM, ESQ., Special Attorney,
U.S. Department of Justice

In behalf of the Defendant-Intervenors:

LAWRENCE HOLLMAN, ESQ.

[3] PROCEEDINGS

THE DEPUTY CLERK: Allen versus Freeman, Civil Action 3379-66.

Civil motion to be argued by Mr. Ryan.

THE COURT: As I understand it there are two motions that have been filed, one by the plaintiff and one by the defendant. Is that correct?

Who filed the first one?

MR. RYAN: I did.

THE COURT: You want to be heard?

MR. RYAN: Yes.

May it please the Court, there are two motions presently pending before the Court, one which was filed by the Plaintiffs and that was entitled a motion to preserve the effectiveness of this Court's Judgment.

On June 15, 1967, the Court did enter an Order granting summary judgment to the plaintiffs and declaring the nearby differential provision of the Massachusetts-Rhode Island Milk Order to be unauthorized and void under the Statute under which it was purported to be promulgated by the Secretary.

Also, at the same time, in that Order enjoined the Secre-

tary from enforcing that particular differential [4] under the same or any other name or designation of that Milk Order or any future milk order.

Now, subsequent to that time and while this Order was in effect and while there was no stay, this Court incidentally denied the defendant's motion for a stay at the time of entering the order and then subsequently the Court of Appeals also denied the motion for a stay that was filed by the defendant-intervenors in the Court of Appeals, Frederick T. Zuber, et al. So, subsequent to that time, the Secretary caused to be issued a recommended decision in which he states that the particular farm location differential provisions under the Massachusetts-Rhode Island Order should be continued.

Now, this was subsequent to this Court's Order declaring that differential unauthorized and void. So, a question arises in our minds specially in view of the type of proceedings that take place in these administrative hearings whereby we are not represented and in view of the fact that this Court has previously also held that the Secretary was not entitled to a stay of these proceedings pending the alleged exhaustion of the administrative remedies. We are concerned that this is an attempt to perpetuate this differential contrary to this Court's Order and we will sustain additional irreparable injury [5] because the Secretary's intent is clear and to us it flies in the face of this Court's Order.

And we are concerned also that he purports to enlarge the marketing area which would extend the injury, and possibly give him grounds for saying, although in our view speciously that this is a new differential and, of course, the Order of this Court precludes this particular type differential under the same or any other designation, any other order.

Now, we are also concerned because in this recommended decision that was published in the Federal Register on July 6, 1967, the Secretary also purports to rectify his previous lack of findings.

He re-opens by himself without any notice, without any opportunity for a hearing or anything else. He simply re-opens a hearing record that took place 30 years ago in 1936,

1937, and he substitutes findings made at this time for findings that were made in 1937.

We think that this is highly unusual procedure and, of course, it doesn't accord with due process or any formal amendatory procedures that he is obligated to follow and also we think it is an impossibility to promulgate these new findings under such circumstances.

[6] We think that this Court's Order was clear and we would like some explanation from the Secretary and his representatives concerning the purpose of the recommended decision in view of this Court's Order.

Thank you, Your Honor.

RESPONSE IN BEHALF OF THE DEPARTMENT OF AGRICULTURE, BY IRWIN GOLDBLOOM, ESQ., DEPARTMENT OF JUSTICE

MR. GOLDBLOOM: I am Irwin Goldbloom, Department of Justice, representing the Defendant. May it please the Court, Your Honor. I am frank to state I am somewhat at a loss to understand the whole basis and purpose of the pending motion.

THE COURT: May I be frank, too? I am at a loss to understand why this was taken by the Department of Agriculture while this proceedings is pending in the Courts. It seems to be contrary to the ruling of this Court and in defiance of a ruling of this Court.

MR. GOLDBLOOM: With all deference and respect, Your Honor, I must–

THE COURT: I can't read it any other way.

MR. GOLDBLOOM: The ruling is a recommended decision.

THE COURT: A recommended decision which would go contrary to the ruling of this Court, would it not?

[7] MR. GOLDBLOOM: The recommended decision is in response to a proposal made by a farmer to delete the provision.

THE COURT: Wouldn't it be contrary to the ruling of this Court in the case of Allen against Freeman?

MR. GOLDBLOOM: No, Your Honor, it would not be.

THE COURT: It would not be contrary to it, and not inconsistent with the ruling now pending in the Court of Appeals?

MR. GOLDBLOOM: Unless it is demonstrated that the Secretary has violated the Court's Order by effectuating–

THE COURT: Doesn't the recommended ruling carry out a violation if it goes into effect?

MR. GOLDBLOOM: No, it does not.

THE COURT: I think so.

MR. GOLDBLOOM: Because the Secretary is fully aware of this Court's instruction.

THE COURT: I understand he is but he ignores it.

MR. GOLDBLOOM: As I read this, this is simply a discussion which is required under the rules of practice.

THE COURT: Why don't you let the case go to the Court of Appeals and be decided on by the Court of Appeals on the record which was made in this Court, and on which this Court [8] ruled instead of trying to change the record in the course of litigation?

MR. GOLDBLOOM: Your Honor, I respectfully suggest we are not attempting to change the record and to the extent that there is any statement that did not appear at the time of the Court's ruling, it is clear and open what the Secretary is saying.

THE COURT: I agree it is clear and open, but I think it is inconsistent with the Court's ruling.

MR. GOLDBLOOM: Well, the Secretary has taken no action whatsoever which would in any way undermine or fly in the face of the Court's Order.

THE COURT: What would happen–let's assume the Court of Appeals shall affirm the ruling of this Court. What would be the status of the case then?

MR. GOLDBLOOM: The Secretary would be permanently enjoined from effectuating.

THE COURT: Wouldn't he be enjoined from what he now proposes to do in this?

MR. GOLDBLOOM: He proposes to do nothing affirmative, Your Honor.

He simply denied the proposal to delete the nearby differential which has nothing whatsoever to do with the law suit.

[9] As we understand the case, the proposal was simply to delete the differential. The plaintiffs in this case have succeeded in obtaining that differential by an injunction of the Court.

THE COURT: Why was it necessary for the Secretary to make these findings?

MR. GOLDBLOOM: This is his discussion under the Rules of Practice.

THE COURT: It is his discussion in which he finds fault —takes issue—with the ruling of this Court. Isn't that a fact?

MR. GOLDBLOOM: Well, the statements speak for themselves.

THE COURT: I think they do, too.

MR. GOLDBLOOM: I don't believe there is any purpose to take issue in any way which would undermine the Court's Order. There is a clear recognition by the Secretary that he is enjoined and in no way—as the provision—as the Secretary, himself, has said, we do not, of course, by our present findings in the matter intend to ignore or circumvent in any way the recent decision of the District Court in the Allen case.

In the present circumstances and pending final disposition of the Allen case, and such appellate decision that may be taken in furtherance of our authority under the [10] Act, we are constrained to state our full views in this matter.

This statement is made in response to a proposal made quite sometime ago to delete—

THE COURT: Isn't this the same proceedings that was pending at the time this matter was before the Court in the case, for the Court to remand the case to the Secretary for further proceedings, and the Court refused to do so?

MR. GOLDBLOOM: That is so. The Government proposed that the Court not rule on the matter.

THE COURT: That is right.

MR. GOLDBLOOM: Until the Secretary had ruled.

THE COURT: That is right. But the Court said it would not do it—that—The Court said it would rule.

So, therefore, the Secretary went right ahead and did what the Court said he shouldn't do.

MR. GOLDBLOOM: I didn't read the Court's decision as restricting the Secretary from concluding the administrative proceedings.

I might point out to the Court that the matters before the Secretary contained some 65 or so proposals and the discussion of various proposals under the Massachusetts-Rhode Island [11] Marketing Order covers some 22, 23 pages of discussion in the Federal Register, the Secretary covering many many other topics and provisions of the Order other than the nearby differential.

The Secretary has the responsibility to conclude these rulemaking proceedings and all that is involved here is a recommended decision. It gives the parties, those who are interested, an opportunity to submit their exceptions to this ruling and as it turns out, the exceptions, the time for filing has already elapsed, but numerous exceptions have been filed; the matter is still pending for referendum, and there is no vote as of this time.

As I would read the Plaintiff's motion, it would be to say to the Secretary: You are forever enjoined from conducting administrative proceedings here; but I would like to point out the Secretary has not done anything affirmative.

THE COURT: I think what it means is you are enjoined from conducting administrative proceedings which are inconsistent with the ruling of this Court.

If the Court of Appeals should reverse this Court, of course, it would restore it to the status quo, but if the Court of Appeals should affirm, that is the law of the case.

I don't understand the Secretary has a right to [12] defy this Court.

MR. GOLDBLOOM: I don't believe the Secretary has in any way defied any Order of the Court.

The Court requires him not to enforce the provision held invalid and the Secretary has not enforced that provision consistent with this Court's Order and subsequent Court Orders.

THE COURT: Isn't the Secretary proceeding on the

assumption this Court's ruling is incorrect, and the validity of the Regulation?

MR. GOLDBLOOM: I believe the Secretary's statement is proceeding on that assumption, but in no way has he taken any action.

THE COURT: He hasn't taken any action; but it is preliminary to the action; it is a step in the action.

MR. GOLDBLOOM: I fail to see how the Secretary can take any action in the face of the Court's instruction.

THE COURT: I agree with that.

MR GOLDBLOOM: And, I submit to the Court, the Secretary under no set of circumstances intends to avoid or act in any way in defiance to the Court's injunction.

THE COURT: Do I understand you to say to the Court, the Secretary does not propose to take any action in this matter until final disposition of the case in the Court [13] of Appeals or whatever appellate proceedings might be taken? It might go up to the Supreme Court. I don't know.

MR. GOLDBLOOM: I am not certain I understand the Court's question.

THE COURT: The findings which the Secretary has made, which are published in the Federal register, I understand you to say is a preliminary step to a further step to be taken by the Secretary. This is one step in the administrative procedure?

MR. GOLDBLOOM: That is correct, Your Honor.

THE COURT: Which would ultimately result in a ruling by the Secretary which is inconsistent with the ruling of this Court in the Allen case, isn't that a fair statement?

MR. GOLDBLOOM: If the Secretary would put into effect a marketing Order which he failed to delete, the proposal, it would only be an act in defiance if he thereupon set his own Order above the dignity of this Court's Order, and proceeded to act in defiance of the Court's Order.

I do not believe that there is any basis upon which the Secretary will act in defiance of the Court's Order.

THE COURT: Do I understand you to concede? Correct me, if I am wrong; I could be, obviously. You say the steps

which have now been taken by—have been taken by the Secretary, are preliminary to an issuance of the Order [14] inconsistent with the ruling of this Court; is that a correct statement?

MR. GOLDBLOOM: That is correct, Your Honor.

THE COURT: Don't you think I should stop it?

MR. GOLDBLOOM: You shouldn't stop it, Your Honor, until the Secretary has acted in some way which is directly inconsistent.

THE COURT: He is now acting in a preliminary way to defy this Court's order which is now an Order of the Court.

MR. GOLDBLOOM: With due deference, Your Honor, the Secretary—

THE COURT: Do you concede that?

MR. GOLDBLOOM: But what this involves is a denial of the Secretary's—for want of something better—his right of freedom of speech to discuss what the issues are in an administrative proceeding. The Secretary does—under no circumstances, intends to defy the Court's Order.

THE COURT: It all depends on what we mean by defy. You, apparently, have a different concept of "defy" than I do. You think a defiance would not arise until the Secretary in fact issued an Order which ignored and was contrary to the ruling of this Court.

[15] I am inclined to take the view that preliminary steps are also in defiance of this Court if their ultimate object is the issuance of an order which is inconsistent with this Court's ruling.

MR. GOLDBLOOM: I do not believe that the Secretary would issue an order.

THE COURT: But you do agree that the Secretary has taken steps now leading to the issuance of an order which would be contrary to the ruling of this Court; is that a correct statement?

MR. GOLDBLOOM: If I may explain myself in terms of—

THE COURT: I am sorry. I shouldn't be interrupting you. You go right ahead.

MR. GOLDBLOOM: I simply would like to explain myself. The Secretary, if he should issue an order as result of these

administrative proceedings would clearly upon the issuance of such an order recognize the injunction of this Court as barring him from proceeding to enforce or effectuate any provision relating to the nearby differential. To that extent it would clearly not be inconsistent or defiant of the Court's Order.

The Secretary would not issue an Order which would not recognize the outstanding effectiveness of this Court's [16] injunction so that I don't—if I committed the Secretary to that course of action, which the Court described as acting in defiance of the Court's Order, let me retract it. The Secretary will not issue an order as result of this administrative proceeding which would be in defiance of the Court's Order—that is, the Court's injunction. (correcting)

All it has done here is a discussion on the basis of the record before the Secretary, in this administrative proceeding. The Secretary—if this should go to a final decision after a referendum of the affected dairy farmers—

THE COURT: Do you mean that during the pendency of this litigation in the appellate courts that you would go through a referendum?

MR. GOLDBLOOM: There are numerous other provisions in this Massachusetts—Rhode Island Marketing Order. There are some 65 or so—and they relate to many many features of the Order.

As we have pointed out, the administrative matter has been pending before the Secretary for some time and naturally there are things that need to be corrected or amended in the course of the administrative proceedings. If this referendum should go forward, it wouldn't involve the effectiveness of this Court's Order. It would involve all these other provisions which the Secretary discusses in the course of his recommended decision.

[17] THE COURT: You mean the Court's Order is going to be submitted to a referendum?

MR. GOLDBLOOM: No, Your Honor. I do not mean that. What I am saying to the Court is: The secretary will not act in a final decision as a result of these administrative proceedings which in any way will undermine the Court's Order or be inconsistent with the Court's Order. He cannot do it obvious-

ly since he is under an injunction and he cannot unilaterally circumvent the Court's Order and I do not believe there is any intention on the part of the Secretary to do that. The Secretary has an obligation to administer this marketing order and to take care of the matters that are pending before him during these administrative proceedings. But, I am certain that the Secretary will not as a final matter act in any way which will be inconsistent with the Court's ruling.

He cannot superimpose the final Order over this Court's injunction, and he will not.

THE COURT: What I can't understand: If I concede that and I am sure you are speaking in good faith—how can you say the Secretary has a right to take all these preliminary steps which lead to a substitution of the Secretary's ruling for that of the Court?

MR. LIEBERT: May I speak? I am George G. Liebert. I represent the Office of the General Counsel. I'd like to [18] clarify one point.

Your Honor, the way the Departmentof Agriculture feels about this matter is that the Secretary had an obligation to conclude and make findings on the basis of a record which was about a year old, involved many proposals. You have said that this step taken was a preliminary matter indicating an intention to conclude it in the form of an Order.

We do not so consider it. We believe that this is a matter in which the Secretary has said: This is the way I dispose of the proposals which were before me.

THE COURT: Including—

MR. LIEBERT: (interrupting) Including one which was to delete the provision from the Order. He simply said I find no evidence on this record, not before the Court, on this record, and that is what he has to do by statute—to make his findings on the record. I find nothing in this record which would cause me to delete. Me to delete. However, I am aware of the fact that the District Court did enjoin this and until that matter is disposed of, I have said what my position is with respect to this record. That is all. It was not preliminary to enter an order in opposition to this Court's ruling.

Not at all. This is merely a conclusion of an administrative proceedings in a very orderly way.

In fact, I would go so far as to say that the [19] Secretary would be remiss if he hadn't stated his full views on the record.

THE COURT: It sounds like he was trying to get in an argument with the Court.

MR. LIEBERT: No, sir.

It was not his intention. I can say this because I am the one who suggested this was the best way to couch this matter with full deference to the Court's ruling but also with full understanding that the Secretary in the administrative proceedings had his own obligation which he undertook to fullfill on this record, and that is what he did do.

This is our view. It is not with any intention whatsoever–I think the issue is being clouded when it is indicated that the Secretary meant to defy the Court Order.

That isn't in the cards at all. He could not as a matter of law. We all know this; issue an order in opposition to the injunction, but he has to conclude his own administrative proceeding. He has a primary jurisdiction in this matter.

THE COURT: Let's go along, and agree with all that you say. Let's assume that the Court's Order becomes final as result of the appellate proceedings. What is the position of the Secretary now with respect to the subject matter of the [20] Court's Order?

MR. LIEBERT: To delete this provision from the Order, of course.

THE COURT: You do agree that this provision is now deleted by reason of this Court's Order, and will stay deleted so long as this Court's Order is in effect?

MR. LIEBERT: Except insofar, Your Honor–except insofar as this provision and the force and effect of it is in the status quo, money still accumulates in the escrow fund because–because if you in totality deleted this provision in the Order there would be deleted all the accumulation in the fund. So, there will be a partial deletion. We have a failure or a refusal on the part of the Secretary, tantamount–in following

the Court's Order—not to pay out any of these monies; but if a deletion were in effect no money is going to accumulate at all.

THE COURT: Only to the extent that the money is going to accumulate on the escrow agreement—

MR. LIEBERT: Yes.

THE COURT: (continuing) Beyond that, that is the full extent of what is being proposed now?

MR. LIEBERT: Yes. The Secretary doesn't— (not finishing)

MR. RYAN: Your Honor?

[21] THE COURT: Mr. Ryan, do you have anything you want to say in light of this discussion?

MR. RYAN: Yes. First of all, I'd like to make clear that I think these administrative proceedings have been nursed along with the view that they will still be able to say before the Court of Appeals, which they are still saying in the briefs filed in that Court, that these proceedings are still pending.

Actually, the market administrators bulletin shows that these proceedings should have been concluded in January. But once this suit was filed they have been extended and extended.

Not only that, Your Honor, I might mention in that connection, my clients do not have representation really in these proceedings because of a fact that a large number of them belong to organizations like the New England Milk Producers Association, the Dairymen's League—The representatives of those two organizations attempted to intervene in these proceedings. The same attorneys here for the defendant represent those organizations. Now, if they represent us in those administrative proceedings if they vote for us, I submit that we do not have any representation and that the prolongation of these proceedings is just meant to cause us further irreparable injury.

Not only that, Your Honor, but I think that the [22] recommended decision is clearly an affront to this Court.

It goes not solely to the administrative record which was before the Secretary which I might also mention was before this Court, but they go into the Green Valley case, they go

into the Blair case, they state that the Court entered an Order–

THE COURT: They write a brief.

MR RYAN: That is correct, Your Honor.

Allegedly, a class action. They are almost totally in error in virtually all of these paragraphs.

THE COURT: What do you want the Court to do?

MR RYAN: I think the Secretary should hold his hand, Your Honor, in deference to this Court, let alone in respect for the Order of this Court, and that it should delete these provisions from the decision, and not take any further affirmative action pending the resolvement of the issue before the Court of Appeals.

THE COURT: Are you prejudiced at all by these–Federal Register publication?

MR. RYAN: I think I am to the extent where they have tried to issue new findings, to substitute for those which they previously did not make.

THE COURT: They are not the findings before this [23] Court?

MR. RYAN: That is correct, Your Honor, but what I am concerned with is: If they attempt to say that this is–if a new order is issued, that we have to go through this litigation again, through some particular administrative procedure.

That is why I have asked them to come in and to tell the Court what they have in mind.

THE COURT: They pretty well explained what they have in mind.

MR. RYAN: But I think we could be prejudiced by this decision because it does set forth factors or findings that were not before this Court but which they might claim as a new order. In other words, this is the Massachusetts-Rhode Island Order. They also purport to rename this order, to the Massachusetts-Rhode Island-New Hampshire Order, and they may make the contention that this is a separate differential provision under that situation.

I am concerned that we might be forced to undergo additional litigation, Your Honor.

I think they should hold their hand, under the circumstances.

THE COURT: Do you want to say anything further? Either one of you or anyone else?

[24] MR. GOLDMAN: All I would add on the question of prejudice. I fail to see how the plaintiffs are in any way prejudiced by anything the secretary has said in this recommended decision.

MR. LIEBERT: I would like to address the court on one matter on which I think the Court has been misinformed.

THE COURT: If I have been misinformed? I have read the papers. No one has said anything to me; it is my interpretation of the papers.

MR. LIEBERT: Your Honor, I was only going to suggest that the counsel advised the Court there was no way in the world in which his clients could be represented in an administrative hearing before the Secretary. This is incorrect.

The proposal to delete the differential was made by one man—his name was Allen—to delete the proposal. He was supported by five or six individuals. No member of a cooperative undertook to do this.

THE COURT: Were they instigated or encouraged to do it by anyone else?

MR LIEBERT: I have no way of knowing.

THE COURT: It sometimes happens.

MR. LIEBERT: I have no way of knowing that. I only know that these individuals did come. The only point [25] on which I would address myself to the Court and cure was the fact that everybody in an administrative proceeding who has an interest can come in and be heard. Now these people were heard. Maybe not the particular individual clients of Mr. Ryan and Mr. Adams and the others who signed the original petition but certainly any individual in an administrative proceeding may come forward and be heard and on this particular issue on this record which is under discussion they were heard.

Thank you.

THE COURT: I must confess, I don't understand why the Secretary has gone ahead with making these findings which in

my judgment are contrary to the findings of this Court in this case, and there could be some motive which is not clear, which concerns me. Because we have these things from time to time with administrative agencies.

However, in the light of the representations made to the Court, I am of the opinion that no further action should be taken by the Court at this time in relation to the matter which Mr. Ryan has brought to the Court's attention.

Is that clear?

MR. GOLDBLOOM: Yes.

(Whereupon, at 10:45, the hearing on the motion was concluded.)

[Filed Sept. 15, 1967]

[Caption Omitted in Printing]

ORDER

This matter having come on before the Court on September 5, 1967, on plaintiffs' motion for preservation of effectiveness of the judgment and order of this Court, and the Court having considered the plaintiffs' motion and the defendant's opposition thereto, and counsel having been heard, and the Court being fully advised and having denied the motion upon the representations made by counsel for the defendant, it is this 15th day of September, 1967,

ORDERED that plaintiffs' motion be, and it is hereby denied.

/s/ Joseph C. McGarraghy
United States District Judge

[Filed Sept. 15, 1967]

[Caption Omitted in Printing]

ORDER

This Court, having entered a preliminary injunction on the 16th day of January, 1967, restraining and enjoining the defendant Secretary of Agriculture from enforcing the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, and requiring the defendant Secretary to take all necessary action to collect and place the nearby differential payments in an escrow fund pending further order of this Court,

and This Court having entered an order on the 17th day of March, 1967, on consent of the plaintiffs and defendant, modifying the said preliminary injunction to allow for the disbursement from said escrow fund of that portion thereof as was attributable to the marketing of milk of nearby producers and for the future payment to nearby producers of that portion of the nearby differential as is pro rata attributable to the marketing of their milk, the portion of the nearby differential payments emanating from non-nearby producers as attributable to their marketing of milk remaining in said escrow fund and being subject to future escrowing each month pending further order of this Court,

and this Court having on the 15th day of June, 1967, entered an order granting summary judgment in favor of plaintiffs and their class of non-nearby producers, (McGarraghy, J.),

and the Court of Appeals for the District of Columbia having on the 5th day of July, 1967, entered an order denying the defendant intervenors' motion for a stay of effectiveness of the order and judgment of this Court of June 15, 1967, but without prejudice to this Court's entry of such order as it may deem advisable concerning preservation of the status quo pending appeal, and a consent order having been entered by this Court (Waddy, J.) on the 7th day of July, 1967, temporarily preserving the status quo pending a full hearing on the question before Judge McGarraghy, and

Upon consideration of the motion for preservation of the status quo filed herein by the defendant intervenors on August 11, 1967, the Opposition of the plaintiffs thereto, as well as the points and authorities filed herein, and the memoranda of the States of Massachusetts, Connecticut and Vermont as *amicus curiae*, and after hearing argument of counsel for defendant intervenors and plaintiffs in open court, and counsel for the defendant having advised in open court that it has no interest in the contested funds or objection to the motion of the defendant intervenors, thereupon, upon consideration of all of the foregoing and it appearing to the Court that if the escrow fund was presently disbursed pro rata to non-nearby producers and they henceforth received a uniform price for their milk without deduction of the nearby differential and escrowing of the same, there would be no practical means of recovery of such monies in the event of reversal of this Court's order and judgment of June 15, 1967, and it further appearing to the Court that preservation of the status quo would simply require payment into the escrow fund as heretofore provided by the order of this Court of January 16, 1967, as modified by the consent order of this Court of March 17, 1967, pending a decision by the Court of Appeals on the appeal taken by defendant intervenors from the order of this Court of June 15, 1967,

WHEREFORE, it is by the Court this 15th day of September, 1967,

ORDERED, that the portion of the nearby farm location differential of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, attributable to the marketing of milk of non-nearby milk producers, and which under the June 15, 1967, Order of this Court would be paid to the plaintiffs and their class of non-nearby producers, shall continue to be deposited in the said escrow fund or account in the custody of this Court in accordance with the terms set forth in the preliminary injunction entered herein on January 16, 1967, as modified by the consent order entered herein on the 17th day of March, 1967, pending a decision by the United States Court of Appeals for the District of Columbia on the appeal taken by

defendant intervenors from the order of summary judgment of this Court of June 15, 1967, or the further order of the United States Court of Appeals, and it is further

ORDERED, that the Order and Judgment of this Court of June 15, 1967, shall remain effective in all respects except as to the escrowing of the aforesaid nearby differential to preserve the status quo.

/s/ Joseph C. McGarraghey
District Judge

September 15, 1967—Margin endorsements on both proposed orders for stay, one filed by Plaintiffs and the other by Zuber et al., were as follows: "This proposed order is disapproved."

[Filed July 10, 1967]

Notice of Appeal

Notice is hereby given this 10th day of July, 1967, that the Intervenors hereby appeal to the United States Court of Appeals for the District of Columbia from the Order entered herein on June 15, 1967 denominated "Order Granting Motion for Summary Judgment & Judgment for Declaratory and Injunctive Relief."

[Subscription omitted in printing]

[Filed August 14, 1967]

NOTICE OF APPEAL

Notice is hereby given this 14th day of August, 1967, that defendant Orville Freeman, Secretary of Agriculture, hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered June 15, 1967, granting plaintiffs' motion for summary judgment and judgment for declaratory and injunctive relief, in favor of plaintiffs and against said defendant.

Appeal is also hereby taken from the order of this Court entered March 13, 1967 denying defendant's motion to hold proceedings in abeyance.

[Subscription Omitted in Printing]

EXHIBIT FILED BY APPELLEES AS AN ATTACHMENT TO THEIR MOTION FOR SUMMARY REVERSAL IN DOCKET NO. 21,308.

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
WASHINGTON

I hereby certify; pursuant to Title 28, United States Code, Section 1733, that each attached document is a true and correct copy of a document in my official custody as hereinafter described:

Copies of Exceptions to the Recommended Decision (32 F.R. 9902, July 6, 1967) in the proceeding entitled "Milk in the Massachusetts-Rhode Island-Connecticut Marketing Areas - Docket Nos. AO 14-A 38 and AO 305-A 12" filed by the following:

1. Leonard F. Korzun, Cuttingsville, Vermont [Vice-Chairman, Dairy Emergency Council, and Trustee of Farm Bureau]

2. David F. Dickinson, President, East Wallingford-Pittsford local N.E.M.P.A. 145 Members

3. Jesse D. Billings, 3rd, Milk Producer Delegate for Ruthland-Pittsford Vermont local Dairymen's league Coop.

4. Frank W. Hyde, Chairman, Vt. State Grange Agriculture Comm., Randolph Center, Vermont

5. R. Gilbert Buckley, Livermore Falls, Maine [Pres., Local]

6. B. W Stryker, President, Corinth, N.E.M.P.A., Corinth, Vermont

7. Harold M. Carson, Newbury, Vermont [Pres., Alliance of Northeast Dairymen]

8. Paul E. Durost, President, Island Falls, local N.E.M.P.A.

9. Peter Galbeani, President, Bradford local

10. Robert Townsend, President, Lyndonville [Local]

11. Harold Wentzell, Colebrook, New Hampshire local N.E.M.P.A.

12. Joseph Sheham, President, Manchester Augusta Maine local

13. Farrington L. Charles, President, Madison-Skowhegan N.E.M.P.A.

14. Philip H. Hoff, Governor, State of Vermont

15. Dwight F. Bessette, President, Middleburg, Vermont

16. Dean Jackson, President of Eastern Milk Prod. of New Haven, Vermont

17. Merlin T. Doyle, President, Chelsea, Vt. N.E.M.P.A.

18. Theron C. Benedict, President, Vergennes, Vt. Dairymen League

19. Francis Atwood, President, Bellows Falls local

20. Charles A. Goldsmith, President, Derry & Chester N.H. local N.E.M.P.A.

21. Dwight F. Bessette, Vergennes, Vermont [Pres., Middleburg Local]

22. George Andrew, Plainfield, Vt. [Marshfield & Plainfield, Vt., Local, N.E.M.P.A.]

23. Francis Branon, Secretary, Alliance of the Northeast Dairymen

24. Keith Wallace, President, Vermont State Farm Bureau, Inc.

25. David F. Dickinson, Chm. Dairy Emergency Council

26. Robert J. Branon, Commissioner of Agriculture, Vermont State Department of Agriculture [4,200 farmers]

27. Cover page and pages 10, 11 and 12 of Exceptions submitted by John C. York, General Manager, Eastern Milk Producers Cooperative Association, Inc.

28. Page 1 of Exceptions submitted by David C. Arms, Economist on behalf of 10 listed Cooperatives

29. Robert A. Magoon, Secretary, Vermont Federation of Sportmen's Clubs [7,000 members]

In testimony where of I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 31st day of August, 1967.

/s/ Orville L. Freeman
Secretary

By /s/ Eugene R. Meyer
Hearing Clerk

168-A

JOINT EXCEPTION

TO RECOMMENDED DECISION ISSUED JUNE 27 WITH RESPECT TO NEARBY FARM LOCATION DIFFERENTIALS IN PROPOSED MASSACHUSETTS - RHODE ISLAND - NEW HAMPSHIRE FEDERAL MILK ORDER

(Material Issue No. 8)

[Rec'd Aug. 14, 1967;
U.S. Dep't of Agr. Office of the Secretary;
The Hearing Clerk]

IN BEHALF OF:

Cabot Farmers' Coop. Creamery, Inc.	Cabot, Vermont
Grand Isle County Coop. Creamery Assn., Inc.	Grand Isle, Vermont
Granite City Coop. Creamery Assn., Inc.	Barre, Vermont
Maine Dairymen's Association	Augusta, Maine
Milton Cooperative Dairy Corporation	Milton, Vermont
Northern Farms Cooperative, Inc.	Montpelier, Vermont
Richmond Cooperative Assn., Inc.	Richmond, Vermont
St. Albans Cooperative Creamery, Inc.	St. Albans, Vermont
United Farmers of New England, Inc.	Boston, Mass.
White River Valley Dairies, Inc.	Randolph, Vermont

The above cooperative associations representing producer members in northern New England and in New York jointly except to the recommended decision to retain and enlarge the discriminatory nearby farm location differential payment provisions in the proposed Massachusetts - Rhode Island - New Hampshire Federal Milk Order.

The farm location provisions are not in the public interest for they perpetuate two basic inequities not authorized under the Agricultural Marketing Agreement Act. These inequities are: (1) the transfer of pool monies otherwise accruing to all producers to select producers located closer to the marketing area, and (2) the establishment of artificially low values or prices for milk at distant country points thus serving as an effective deterrent to the entry of milk supplies that might otherwise compete for outlets.

STATE OF VERMONT
DEPARTMENT OF AGRICULTURE
MONTPELIER
05602

[Rec'd Aug. 11, 1967]

July 26, 1967

Hearing Clerk
United States Department of Agriculture
Washington, D. C. 20250

Statement of Vermont Department of Agriculture filed as exception to the Recommended Decision on Proposed Amendments to the Massachusetts-Rhode Island and Connecticut Federal Market Order

To base the decision on historical evidence to retain nearby differentials in the Massachusetts-Rhode Island Order is not valid. Previous to improved transportation and refrigeration, handlers were willing to pay a higher price for local milk, in order to insure an adequate supply of fresh milk. However, as improved transportation and refrigeration was developed, the handler no longer was willing to pay a higher price and began to import milk from distant farmers for his needs. This resulted in milk coops and associations finding it difficult to find a Class I market for local milk and so they requested a hearing for a Federal Milk Marketing Order, which eventually was established.

One of the functions of a Federal Milk Marketing Order is to establish a minimum price for milk by an approved economic formula. There is no valid reason, therefore, to manipulate this minimum price within the Order by taking money from one group of farmers and giving it to another group.

The 4200 dairy farmers supplying 50% of the milk to the Massachusetts-Rhode Island Order are concerned about the nearby differential to the extent that it could jeopardize an orderly market and an adequate supply, which is the objective of a Federal Milk Market Order.

The Vermont Department of Agriculture, therefore, requests that you reconsider your decision on nearby differentials.

/s/ Robert J. Branon
Commissioner of Agriculture
Vermont State Department of Agriculture

VERMONT STATE FARM BUREAU, INC.
24 Elm Street
MONTPELIER, VERMONT 05602

[Rec'd Aug. 14, 1967]

Aug. 9, 1967

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C. 20250

Dear Sir:

We have received the notice of recommended decision on amendments to the Massachusetts-Rhode Island Milk Marketing Order as published in the Federal Register volume 32-Number 129 of Thursday July 6, 1967.

We are in accord with most of the proposed amendments presented there. However, we wish to file exception in connection with Number 8, farm location differentials. We believe that most of the justification for the original establishment of location differentials for nearby producers which were then existant, such as higher taxes, labor and other production costs, are no longer an important factor. In addition, "Normal supplies of milk for the Boston area" now include northern New England.

For these reasons we believe the location differentials should be discontinued, effective when other amendments contained in the recommendation decision go into effect.

Sincerely,

/s/ Keith Wallace,
President

KW:jl

[Rec'd Jul. 24, 1967]

Cuttingsville, Vermont 05738
July 16, 1967

The Hearing Clerk
United States Department of Agriculture
Washington, D. C., 20250

Dear Sir,

I wish to file exception to section 8 on farm location differentials under the hearing held for milk in the Mass.-R.I. and Conn. Marketing areas. I am a dairy farmer in Shrewsbury, Vt., shipping bulk milk to a United Farmers plant in Charlestown, Mass. My grandfather once shipped fluid milk via rail to Hood in Boston in 1924. Subsequently, the area farmers were dropped from this market.

In defense of retaining the nearby differentials you use the terms "customarily," "historically," "were preserved," et cetera. These seem to be your sole arguments. I feel they are archaic and out dated. The situation now differs: 1) A far larger percentage of the fluid milk comes from beyond the nearby zones than in 1937. 2) Most of the milk is now bulk tank, far easier to ship and cooled by the producers. 3) The federal orders set a *minimum* price dealers must pay; there is nothing to prevent a dealer from paying nearby farmers a premium. If dealers will not on their own, then how does your argument

stand that the far away producers need to subsidize the nearby ones? 4) In 1965 the highest percentage of farmers going out of business was in Vermont. 5) In 1966 it was the Vermont farmers who protested strongly enough for the USDA to hold hearings on milk pricing; not the nearby farmers who must have been getting enough. 6) In sending letters out to the Rutland County farmers we have received an overwhelming response in favor of eliminating the nearby differentials and a pledge of money from 25% of them to support the court case; we feel that a referendum would overwhelmingly ask for the elimination of nearby differentials. 7) This past month two farmers whom we know committed suicide, one from labor troubles, another from financial problems, both with 120+-head herds. 8) In late 1965, Vermont farmers' prices were so low that those under the Vermont Milk Control Board asked for and got a rise from 25¢ to 40¢ per hundredweight over the Boston 200 zone price. 9) Only two orders in the country have the nearby differential, both in the northeast. 10) Nearby differentials are open and direct discrimination. They pit one group of farmers against another, obscuring issues that are important to all dairy farmers. The philosophy of the present administration is to eliminate discrimination, by law or court order if necessary. 11) Many farmers claim ignorance of having heard of these differentials and would have otherwise testified against them. There is a complaint also that the hearings are held during the haying season and so far from the centers of milk production that the great number of farmers are deterred from attending these hearings.

I am writing for myself as an individual farmer, as Vice-chairman of the Dairy Emergency Council, representing farmers of all cooperatives in Rutland County, and I also speak as

a Trustee for the Farm Bureau of Vermont which has voted for the past three years to abolish the nearby differential.

Yours truly,

/s/ Leonard F. Korzun
Member, United Farmers
Director, Farm Bureau
Vice-chairman, Dairy Emergency Council
Local Director, Eastern Breeders Assoc.

VERMONT FEDERATION OF SPORTSMEN'S CLUBS, INC.

[Rec'd Aug. 15, 1967]

August 14, 1967

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C. 20250

The Vermont Federation of Sportsmen's Clubs, which is the Vermont affiliate of the National Wildlife Federation and has over 7,000 members, wishes to submit the following exception to the recommended decision regarding proposal (8) farm location differentials, as printed in the Federal Register, Volume 32, Number 129, Part II, pages 9918-9921, Thursday, July 6, 1967, Washington, D.C.

We take exception to the recommended decision for three reasons:

1. Nearby farm location differentials have been declared illegal by decision of the U.S. District Court, District of Columbia.

2. As Sportsmen and Conservationists, we are deeply concerned about the steady loss of farms each year in Vermont. The Vermont farmer provides a wide variety of cover types which make excellent wildlife habitat. His land is generally

available to the public for hunting, fishing, and other recreation free of charge. Moreover, Vermont farm land contributes immeasurably to the scenic beauty of Vermont by lending variety to the Vermont landscape and providing open land which allows scenic vistas of the distant mountains, lakes, and forests.

The nearby farm location differential harms the Vermont farmer financially by subtracting approximately 12¢ per cwt. from the price of his milk. We believe that this practice should be discontinued, inasmuch as it is based on historical reasons which are no longer valid. There is nothing wrong with the farmer located near major cities receiving a higher price for his milk, but his price advantage should come from the dealer and not from the pockets of his fellow farmers from more distant areas. Therefore, as sportsmen and conservationists with a vital stake in the future of Vermont farmers, we believe that nearby farm location differentials should be discontinued permanently.

3. As consumers of dairy products, we are alarmed at the decline of dairy farming in Vermont. Although we presently have an abundance of dairy products, the exploding world population may well change this situation in the space of a very few years. It seems only prudent, therefore, that we try to keep our dairy farmers in business, for it is not easy to restore an abandoned, brush-grown dairy farm to full productivity in time to meet any emergency food shortages.

/s/ Robert A. Magoon, Secretary
Vermont Federation of Sportsmen's Clubs

(For the Executive Committee of the Vermont Federation of Sportsmen's Clubs)

STATE OF VERMONT
EXECUTIVE DEPARTMENT
MONTPELIER

[Rec'd Jul. 28, 1967]

July 25, 1967

Hearing Clerk
U.S. Department of Agriculture
Washington, D. C. 20250

Statement by Philip H. Hoff, Governor, State of Vermont, filed as Exception to the Recommended Decision on Proposed Amendments to the Massachusetts-Rhode Island and Connecticut Federal Marketing Orders.

Minimum Prices

Federal milk marketing orders are established in order to sustain an adequate supply. One of the methods by which this adequate supply is maintained is by establishing a minimum price to be paid to producers. This price is arrived at by using an economic formula devised for this purpose. Therefore, no Federal milk marketing order should contain provisions which result in producers in one geographic area subsidizing producers in another geographic area. This results in many producers receiving less than the minimum price as established by the economic formula.

We take exception to the recommended decisions on nearby differential on the ground that no provisions in a Federal order should result in decreasing the minimum price to be paid to one group of producers in order to increase the minimum to be paid to another group.

It is our contention that where farm prices to nearby area farmers were significantly higher during those years before Federal orders were in effect, these higher prices were justified because improvements in transportation, refrigeration and quality control had not progressed to the extent that milk

dealers and handlers could advantageously purchase all or part of their supply in the distant areas.

During the 1950's, improvements in transportation, refrigeration and other quality influencing factors had progressed to the extent that milk handlers realized that there was no advantage in securing local milk at existing prices. They therefore proceeded to curtail their local purchases and arranged to purchase their needs from distant farmers at lower prices. This situation resulted in a request for the establishment of a Federal milk market order. In that area dealers and handlers were dropping entire pick-up route units and leaving considerable milk homeless. Local producers associations and cooperatives finding it difficult to find a market for this milk requested a hearing for the adoption of a Federal order. As a result in 1958 the South East order was adopted.

The 4200 Vermont dairy farmers take exception to the contention that nearby differentials are justified from a historical standpoint.

/s/ Philip H. Hoff

cc: The Honorable George D. Aiken
The Honorable Winston L. Prouty
The Honorable Robert T. Stafford

[Rec'd Jul. 25, 1967]

Hearing Clerk
U.S. Department of Agriculture
Washington, D. C. 20250

The VERMONT STATE GRANGE submits the following statement and an exception to the recommended decision in respect to proposal (8) farm location differentials as printed in the Federal Register, Volume 32, Number 129, Part II, pages 9918-9921, Thursday, July 6, 1967, Washington, D.C.

Exception to decision to continue farm location differentials is taken on contention that Federal Milk Marketing Order pricing provisions are intended for the purpose of stabilizing market and to insure adequate supplies of pure and wholesome milk. Federal Milk Marketing Orders establish minimum prices and therefore should not contain provisions which result in producers in one geographic area subsidizing producers in another geographic area. We do submit that if additional value of nearby milk can be substantiated, additional payment over and above minimum federal order prices should be derived from dealers. The practice of making deductions from pool funds reduces the price received by those producers which are not in the nearby or immediate area. If the nearby and immediate milk does in fact have additional value this will be compensated for through voluntary higher prices.

Dated: July 24, 1967 Signed: Frank W. Hyde, Chairman
Vt. State Grange Agriculture Comm.
Randolph Center, Vermont

Vermont State Grange Agriculture Committee

Frank W. Hyde; Randolph Center, Vt.
Robert Cossingham; Norwich, Vt.
B. Frank Myott; Enosburg Falls, Vt.
Ralph Briggs; New Haven, Vt.
Wallace Russell; Barton, Vt.
G. Roland Lawrence; Albany, Vt.
[illegible] Gendron; 150 Northfield Street, Montpelier, Vt.

Frank W. Hyde, Chairman
Vt. State Grange Agriculture Comm.
Randolph Center, Vermont 05061

[Rec'd July 27, 1967]

Harkdale Farm,
Newbury, Vermont,
July 22, 1967.

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C.

NOTICE OF EXCEPTIONS ON PROPOSED AMENDMENTS TO MASSACHUSETTS-RHODE ISLAND MILK MARKETING ORDERS

I am a dairy farmer operating a dairy farm in Newbury, Vermont, producing milk for the Massachusetts-Rhode Island Market.

I presented testimony at the hearing in Concord, New Hampshire in support of the elimination of "Near By Differentials", and I still believe that any legitimate reason for Near By Differentials when they were first instigated back in the 1930's have long since been out of line due to modern Highways, Tank Trucks, Bulk Tanks. I therefore take exception to your recommended decision.

Furthermore, the farms in the distant areas not receiving the Near By Differential are subject to the same health code and inspection as the farms receiving the Differential.

I therefore take further exception to your recommended decision for our milk is by law just as good as the milk from the near by farms.

I notice with interest, the reference made in the Recommended Decision to the Allen case. In this Russell Allen, et al. v. Orville Freeman action (Civil Action No. 3379-66) Near By Differentials have already been declared illegal by the U.S. District Court for the District of Columbia. I therefore, as a Vermont Dairy Farmer challenge the right of the Secretary to include in the Massachusetts-Rhode Island order a practice that has been declared illegal.

/s/ Harold M. Carson

[Rec'd Aug. 14, 1967]

Postmarked at Syracuse, N.Y.
on 8-11-67

TO THE
UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE

Docket Nos. AO-14-A38
AO-305-A12

EXCEPTIONS

TO THE RECOMMENDED DECISION OF JUNE 27, 1967

With Respect To

MARKETING OF MILK

UNDER THE MASSACHUSETTS-RHODE ISLAND AND
CONNECTICUT FEDERAL ORDERS

August 11, 1967

Eastern Milk Producers
Cooperative Association Inc.
Kinne Road
Syracuse, New York 13214

* * *

FARM LOCATION DIFFERENTIALS

Eastern excepts to the recommended provisions for farm location differentials on legal grounds.

Eastern's exception is based upon the illegality of such provisions under the doctrine of *Blair v. Freeman* (370 F.2d 229, CCA DC 1966), as applied to the Massachusetts-Rhode Island Order in *Allen v. Freeman* (Civil Action No. 3379-66). Obviously the *Allen* case is at the present time the "law of the land"—that is, the transactions governed by the Massachusetts-Rhode Island Order.

The Recommended Decision is in error in relying on the *Green Valley* decision and it is contrary to the *Blair* and *Allen* case. Furthermore, there was no evidence at the current hearing to upset the basis of the *Allen* case. In other words, there was no testimony at the present hearing whatsoever that before the Boston Order was originally instituted in 1937 there was any farm location differentials "customarily applied by the handlers". Without such proof, the *Allen* case has to stand. The findings on page 9919, 2nd and 3rd column, are without evidentiary foundation, and governmental expertise as therein expressed cannot take the place of evidence as to the pre-1937 situation in the Boston marketing area.

What happened *after* 1937, when the original Boston Order adopted location differentials, is of no significance, any more than in the New York Order. Certainly business decisions have been influenced by the inclusion of location differentials in the Boston Order and successively in the secondary New England markets and in Connecticut; but under the Act, the Secretary is only permitted to approve adjustments "customarily applied by handlers", [608c(5) B(ii)(a)] – and this means customarily applied *before* the Order went into effect. Business decisions after the Order went into effect have no significance or validity in determining what differentials existed before the Order went into effect. This seems so obvious that it should not even be mentioned in the brief, but the Recommended Decision still seems to belabor the point that since the location differentials have been in the Order and business has thereafter relied on them, they should be kept in whether they are legal or not. This is clearly contrary to the decision in the *Blair* case, where such differentials were declared illegal even though business decisions had been made by many Order II handlers for many years in reliance of such differentials being in the Order, both before and after its extension to Jersey and upstate New York.

Nor is it proper for the Recommended Decision at page 9919, column 2 to attempt to justify a farm location differential as an adjustment for "the locations at which delivery

of such milk is made" as provided in Section 608c(5)(B)(ii)(c). The court in the *Blair* case specifically held such reasoning fallacious in any case, where, as here, the farm location differential is explicitly intended to give a nearby producer a greater share of the fluid milk market than he would obtain under marketwide pooling without such a differential.

Thus, strictly from the legal point of view, the continuance of the farm location differentials is unauthorized and contrary to the case law interpreting Section 608c(5)(B)(ii)(c)(ii) of the Act.

Respectfully submitted

EASTERN MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.

/s/ John C. York, General Manager

Robert H. Pelley
Economist

August 11, 1967

[Rec'd Aug. 9, 1967]

Hearing Clerk
United States Department
of Agriculture
Washington, D.C. 20250

Your Honor:

The Alliance of the Northeast Dairymen, Inc. hereby files exception to proposal No. 129 regarding continuance of the nearby differentials as contained in your recommended decision as published in Volume 32 of the Federal Register dated July 6, 1967.

We fully realize the purpose of our Federal Milk Marketing Order to be an act to establish an orderly system of market-

ing milk and guaranteeing a uniform minimum price to producers, in order to furnish an adequate supply of fresh wholesome milk to the consumer. The intent was, of course, to promote the welfare of the common good. Historically, at its inception, the nearby producers were supplying a nearly sufficient volume of Class I milk for this market. Distant milk was shipped via slow freight in cans rolled into railroad cars refrigerated with ice obtained from local ponds, rivers and creeks. Please compare this with present day methods.

The nearby differential was merely a "political gimmick" to entice the nearby producers, who had a ready market for their milk, to accept regulatory provisions to aid in the orderly marketing of all milk produced within the confines of order No. I. A "political gimmick" can hardly be called a legal provision.

Today most of the milk in our order No. I pool is supplied by so called distant producers, which is a misnomer.

This is where the milk must be obtained in the future, due to the expanse of urbanization. Even in these areas, abandonment of farms due to economic factors has brought about a reduction of approximately five per cent annually during the last ten years. The subsidization of the nearby producers has contributed immeasurably to this decline. We emphatically state, "This is not in the interest of the public welfare". The nearby differentials are discriminatory by nature, illegal by origin and detrimental to the dairy industry as a whole. We humbly urge you to use your good judgment and reconsider your recommended decision and abolish the nearby differentials so detrimental to those who must produce an adequate supply of pure wholesome milk. How long can we afford to keep the common welfare in jeopardy through discriminatory ordinances?

Respectfully submitted,

ALLIANCE OF THE
NORTHEAST DAIRYMEN

/s/ Francis Branon
Secretary.

[Rec'd Aug. 14, 1967]

Postmarked at Rutland, Vt.
on 8-10-67

TO HEARING CLERK
U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

EXCEPTIONS TO RECOMMENDED DECISION

ON PROPOSED AMENDMENTS TO THE
MASSACHUSETTS-RHODE ISLAND
MILK MARKETING ORDERS

FROM DAIRY EMERGENCY COUNCIL
CENTER RUTLAND, VERMONT
JULY 20, 1967

The opposition to farm point pricing have argued that it would increase the spread between the prices of the Mass.-R.I. and the New York-New Jersey orders.

However, as a result of the hearing of April 14-15, 1967, held in Washington, D.C., the supply-demand mover in the order had a floor put under it and the Class I price was frozen until April 1, 1968.

Therefore, the change over to farm point pricing would not dilute the pool or harm producer prices.

The last item I would like to bring to the attention of the hearing clerk is that handlers use hauling charges or the lack of them as a means of paying premiums to producers.

The H. P. Hood Co. at Florence, Vermont charges in some cases a ten cent hauling charge and then gives their producers a thirteen cent hauling adjustment.

I contend this is not orderly marketing. Farm point pricing would stop this questionable practice.

If premiums are to be paid they should be paid over the minimum prices; not in under the minimum as is being done at present.

The Dairy Emergency Council, also, would like to be put on record as against farm location differentials in the Mass.-R.I. market.

These differentials are a clear case of discrimination against the distant producers and should be abolished.

/s/ David F. Dickinson
Chm.-Dairy Emergency Council

[Rec'd Aug. 1, 1967]

Hearing Clerk
U.S. Department of Agriculture
Washington, D.C. 20250

[illegible] Massachusetts, R.I., and Conn. Marketing Area

[illegible] provisions set forth in the Federal Register Vol. 32 [illegible] dated Thursday, July 6, 1967. The undersigned wish to file objections to Section 8 titled Farm Location differentials and located [illegible] of Federal Register Vol. 32 No. 129.

This exception is based on the following point. The hearings which elicited testimony relating to Farm Location Differentials were held the date June 20-July 1, 1966. Subsequent reopenings of the Mass., R.I. hearings did not include any testimony relevant to Farm Location Differentials.

During these hearings no new testimony was submitted which would justify the existence of the Farm Location Differential in this marketing order or any other order of the past.

The facts, findings, and history of Farm Location Differentials that are set forth on Pages 9918, 9919 and 9920 have all been presented to the U.S. District Court for the District of Columbia in a court case styled R. Allen, et al. versus Orville Freeman (Civil Action No. 3379-66).

On June 15, 1967, Judge Joseph McGarraghy of the aforementioned court signed and entered an order enjoining and restraining the Sec. of the Agr. from enforcing the Farm Location Diff. Provision of the Mass.-R.I. order.

Exception is taken to Farm Location Diff. on the grounds that recommending the continuation of the same constitutes a non-recognition of the preceding court order.

/s/ Dwight F. Bessette
Vergennes, Vermont
R.F.D. [ ] Box 24

[Rec'd Jul. 24, 1967]

Hearing Clerk,
U.S. Department of Agriculture,
Washington, D.C.

[illegible] exceptions on Proposed Amendments to the Mass.-R.I. Milk Marketing Orders

On behalf of the members of my local of N.E.M.P.A., I would like to file exceptions to the findings as stated in the recommended decision on proposed amendments to the Mass.-R.I. Milk Marketing Orders as stated in Volume 32-Number 129 of the Federal Register, dated July 6, 1967.

Specifically, I disagree, on behalf of my local of N.E.M.P.A. with the decision to maintain farm location differentials in the Mass.-R.I. market.

We contend the practice of deducting money from distant producers to pay a premium to nearby producers is discriminatory in nature and contrary to the intent of milk marketing orders.

It is hereby pointed out that only two federal marketing orders are making a practice of paying farm location differen-

tials. Both of these marketing orders now have court cases challenging the legality of paying such differentials.

Because the farm location differentials in the Mass.-R.I. market has been declared illegal by the U.S. District Court for the District of Columbia in the Russell Allen, et al. v. Orville Freeman action (Civil Action No. 3379-66), it would appear to still keep this provision in the Mass.-R.I. Order is an attempt to operate a Federal Milk Order that is in contradiction with the laws of our country. It does not seem prudent to operate a Federal Milk Order that has been declared illegal by the courts of our land.

The recommended findings cite arguments based on historical and customary practices; also, arguments based on facts pertaining to days when milk was shipped in cans.

Due to improvements in transportation, improvements in highways and the shift to bulk tanks, it would seem these arguments do not apply any longer.

We, also, take exception to our milk marketing orders being developed on custom or history. If this course is to be followed, we wouldn't ever have any changes in our Federal Milk Orders.

We, therefore, ask the Secretary of Agriculture to heed the wishes of the majority of the producers in the Mass.-R.I. market, who are the distant producers, and eliminate farm location differentials.

The nearby producers still will be receiving a price approximately fifty cents more than producers in the 21st zone.

Name: David F. Dickinson - President
Local: East Wallingford-Pittsford Local of N.E.M.P.A.
145 members

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,141

FREDERICK T. ZUBER, et al., Appellants,

v.

RUSSELL ALLEN, et al., Appellees.

No. 21,308

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, Appellant,

v.

RUSSELL ALLEN, et al., Appellees.

Appeals from the United States District Court for the District of Columbia

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Decided September 23, 1968

Mr. Lawrence D. Hollman, with whom *Mr. Carlyle C. Ring, Jr.*, was on the brief, for appellants in No. 21,141.

Mr. Walter H. Fleischer, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.*, *Messrs. David G. Bress*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellant in No. 21,308. *Mr. Frank Q. Nebeker*, Assistant United States Attorney, also entered an appearance for appellant in No. 21,308.

Mr. Charles Patrick Ryan for appellees.

Mr. Edward J. Ryan filed a brief on behalf of the State of Vermont, as *amicus curiae* in No. 21,141. *Mr. Charles P. Ryan* also entered an appearance for the State of Vermont as *amicus curiae* in No. 21,141.

Mr. Franklin M. Schultz filed a brief on behalf of the State of Connecticut, as *amicus curiae* in No. 21,141.

Mr. James R. Worsley, Jr., filed a brief on behalf of the Commonwealth of Massachusetts as *amicus curiae* in No. 21,141.

Before BURGER, WRIGHT and McGOWAN, *Circuit Judges.*

McGOWAN, *Circuit Judge:* These are appeals by the Secretary of Agriculture and a group of dairy farmers from a judgment of the District Court declaring illegal and enjoining further enforcement of the "farm location differential" provision[1] in the 1964 federal milk marketing order for the Massachusetts-Rhode Island area. We recently invalidated a like provision of the 1957 New York-New Jersey milk marketing order on grounds of its incompatibility with the Agricultural Marketing Agreement Act of 1937.[2] *Blair v. Freeman*, 125 U.S.App.D.C. 207, 370 F.2d 229 (1966). Since we find that the farm location differential of the Massachusetts-Rhode Island order is no less irreconcilable with the statute, we affirm the judgment and order of the District Court.

I

The rationale and mechanics of federal regulation of the marketing of milk and other dairy products have been fully described in *Blair* and elsewhere.[3] Briefly, the marketing order is designed to eliminate the destructive competition which grew out of the surplus conditions which characterized the milk industry before federal regulation. The device

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[1] 7 C.F.R. § 1001.72 (1968).

[2] 7 U.S.C. §§ 601-24 (1964), *as amended*, (Supp. I, 1965).

[3] *See* Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962); H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939); Grant v. Benson, 97 U.S.App.D.C. 191, 229 F.2d 765 (1955), *cert. denied*, 350 U.S. 1015 (1956); Green Valley Creamery, Inc. v. United States, 108 F.2d 342 (1st Cir. 1939).

chosen to this end is a uniform, "blended" price to be paid by handlers to each producer in the marketing area, regardless of whether his milk is ultimately disposed of by the handler at the high Class I price for fluid use, or at the lower Class II price paid for milk to be used in the manufacture of various milk products (butter, cheese, ice cream, and so on). An equalization pool, called the "producer settlement fund," is administered by the agent of the Secretary of Agriculture to maintain the blended price; and handlers make payments to or withdrawals from the pool in the amounts by which the use value of milk which they handle exceeds or is less than the blended price.

The Act specifies several limited exceptions which the marketing order may make to the requirement that each producer receive a uniform price. Thus, Section 8(c)(5) permits the inclusion in the order of provisions

(B) Providing:

* * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made . . . .

Purportedly acting pursuant to the authority of this section, the Secretary included in the 1964 Massachusetts-Rhode Island order several differentials which operate to vary the payments to producers. These are (1) a "butterfat differential," based on the quality of the farmer's milk;[4] (2) "zone differentials," which vary inversely with the distance from Boston of the handler's plant to which the producer delivers his milk;[5] and (3) the "farm location differentials,"

[4] 7 C.F.R. § 1001.71 (1968).

[5] 7 C.F.R. § 1001.62 (1968).

which are paid to producers whose farms are located near the principal consumption centers. This last form of differential, commonly known as the "nearby differential," is forty-six cents per hundredweight for farmers located in certain designated towns and twenty-three cents per hundredweight for those in more distant towns.

The plaintiffs, 168 dairy farmers who are ineligible for any farm location differential, brought this action against the Secretary of Agriculture seeking a halt to these allegedly discriminatory and unauthorized payments.[6] They are aggrieved in that the differential is paid out of the equalization pool, rather than the handler's own pocket, and consequently reduces the blended price received by all producers. The District Court granted the plaintiffs' motion for a preliminary injunction which provided for the escrowing of the challenged differential, and thereafter, relying wholly on our decision in *Blair v. Freeman*, granted their motion for summary judgment. The escrowing, though later amended to release amounts attributable to nearby producers, was continued pending a decision by this court. When it appeared that the Secretary might not appeal,[7] we granted Zuber and seven other nearby farmers, whose motion to intervene had been denied by the District Court, leave to intervene for the sole purpose of protecting their rights by appeal. The Secretary subsequently perfected an appeal, which we heard together with that of Zuber.

Appellants have pressed upon us several distinct positions. They argue, first, that the farm location differential is valid because it is founded not upon the factor of fluid milk utili-

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[6]The suit was filed a few weeks after our decision in *Blair*. In that case we made clear the wholly prospective nature of our decision, stating that it was "not intended to afford any basis for recovery by appellants or their class based on past payments." 370 F.2d at 240. We reaffirm that approach here.

[7]This prospect was represented as residing in the fact that the Government had decided not to seek review in the Supreme Court of our decision in *Blair*.

zation condemned in *Blair* but on other considerations which are authorized by the Act. Secondly, they contend that, whatever might be the fate of another farm location differential under Section 8(c)(5), this particular provision was explicitly ratified and validated both by Congress in 1937 and by the United States Court of Appeals for the First Circuit in 1939. Thirdly, appellants assert that, if the legality of the provision is not clear, neither is its illegality; and that the case should be remanded to the Secretary to afford him an opportunity to elucidate the legal and factual premises of the nearby differential, or to determine whether, if the differential must fall, the marketing order should be continued, with or without other changes. Finally, it is argued that, even if the District Court is affirmed, considerations of equity dictate that its judgment be wholly prospective from the date of our decision, and that the escrowed monies should be distributed to the nearby farmers who have relied on the farm location differential for so many years. We deal with these points in order.

II

As we held in *Blair*:

> [T]he Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers.[8]

In adopting the New York-New Jersey order in 1957, the Secretary was explicit in his reliance upon this outlawed consideration.[9] He is certainly less so in his justification of the 1964 Massachusetts-Rhode Island order:

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[8] 370 F.2d at 237.

[9] The differential had been designed, he said:

> to give the nearby producer a somewhat greater share of the high-priced [fluid] milk than he would obtain through market-wide pooling without such a differential . . . .

and

> to reflect the fact that under competitive conditions milk produced in this area has a traditional outlet as fluid milk . . . .

22 Fed. Reg. 4213-14 (1957).

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.
>
> . . . .
>
> . . . [W]e believe there are adequate reasons on this record for continuing the farm location differentials at their present rates.[10]

But we do not think it can be said, as appellants now do, that this explanation does not reflect any reliance whatsoever upon the prohibited factor of fluid use patterns. To say, of the order under review, that milk produced in locations close to principal consumption centers has enjoyed "customarily somewhat higher values" above transportation costs, and that the differential is provided to reflect "these historical price relationships by location," may be only a less direct way of saying, as in the case of the New York-New Jersey order, that the differential was designed "to reflect the fact that under competitive conditions" nearby producers got a higher price because they had a bigger share of the fluid use market. If examination is made of the "record" to which the Secretary adverted in his 1964 statement—the various New England marketing orders which preceded the 1964 order and the administrative records on which they were based—it is revealed inexorably that, as in the case of New York-New Jersey, those "historical price relationships by location" were the fluid use advantages which the Act expressly condemns.

The 1964 order consolidated the former federal orders regulating the handling of milk in four separate marketing areas: Greater Boston, Worcester, Springfield, and Southeastern New England. The oldest and most prominent of

[10] 29 Fed. Reg. 11205, 11213-14 (1964).

these was the Greater Boston marketing order. Under federal "licenses" pursuant to the 1933 Agricultural Adjustment Act,[11] milk in the Boston area was marketed, as it had sometimes been by cooperative associations before federal regulation, through base-rating plans. In 1934 the market administrator

> allotted preferential bases to nearby producers to give effect to the historically higher prices they had received in the market. A study was made of the eight years 1926 to 1934 to obtain the proper differential between nearby and distant producers' returns from the sale of milk. It was determined that all producers where milk was *delivered directly to plants located within 35 miles* of the State House in Boston should have bases equal to 85 percent. . . . [as compared with 61 percent for all other producers].[12]

Because many nearby producers refused to comply with the license, and "as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license,"[13] in 1935 cooperative associations agreed to allow producers whose farms were within forty miles of the State House bases of 100 per cent. This forty mile radius later bacame official under Greater Boston Order No. 4

This Order No. 4, promulgated in 1936 after the 1935 amendments to the Act, retained the base-rating system but abandoned the preferential bases for nearby producers. In their place it was provided that producers whose farms were located within forty miles of the State House and *who delivered to plants within the same area* be paid the full Class I price for all milk not in excess of their bases. Other farmers received only the blended price for their bases. Distant producers could, however, receive an additional twenty-one

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[11] 48 Stat. 31 (1933).

[12] Barnhardt, Federal Regulation of Milk Handling in Boston 95 (1947) (emphasis added).

[13] *Id.* at 231.

cents by delivering to a handler within the forty mile radius–a "country station" differential which (unlike the situation today) was not also available to the nearby producer. The latter differential was found by the Secretary to be a "reasonable allowance for the extra handling costs incurred by handlers operating country station plants." As to the former, the Secretary stated that

> the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, *due to the greater availability of their milk for class I use.* . . . (emphasis added)

The order did not expand upon this ground for the preferred treatment of nearby producers. It is a finding which appears to be derived directly from the testimony at the hearing of the representative of the U. S. Department of Agriculture. In explaining the proposed order, he said this about the differential in question:

> Now, I presume that you know some reason for that special provision located in that zone. I am not sure that I made such a statement of that as we here in this brief, and so I think I might make it at this time, and then perhaps there will be further questions.
>
> With respect to this particular provision, it should be noted that a producer whose farm is located near the market is in a position to supply Class I milk for use at all times, at less cost and distances, and if necessary he can, after each twice-a-day milking, put his milk on his own truck and deliver it to a handler or to consumers. Forty miles, however, is approximately a limit of the use of such facility in handling milk.

Evenness of production was certainly not assigned as the reason, presumably because this quality was already compensated by base-rating itself. Higher local production costs had been mentioned at the hearings in support of the special treatment, but this ground was evidently rejected by the Secretary. Since nearby producers were not also to receive the "country station" differential, their preference must have been attributable in large part to transportation and

handling advantages. This surmise is supported not only by the Secretary's use of the word "availability" but also by the following argument in the Department of Agriculture's Economic Brief in 1936:

> It should be noted that a producer whose farm is located near the market is in a position to supply milk for Class I use to the market more easily at all times than those at a greater distance. Much less time is required for the movement of the milk and a greater variety of transportation facilities are available to such a producer. If necessary, he can, after each twice-a-day milking and within two hours deliver it to a handler or even to consumers. . . . Moreover, those producers whose farms are located beyond the forty-mile line who so desire may deliver their milk to handlers within the forty-mile line, in which event they are to be paid the blended price, plus [21] cents. . . .

The savings in transportation and handling expenses were not, of course, the whole story. The Agriculture Department's testimony and brief identify another element which was also heavily emphasized at the hearings, namely, the nearby producers' opportunities for direct access to the consumer. This fact was cited at the hearings as the explanation for traditionally higher prices to nearby producers ("he can sell it to the dealer or become a dealer himself, and go direct to the [consumer], and you cannot stop him") and as a potential "menace to the enforcement of the agreement."

In sum, the Secretary did not indicate that he had accorded nearby producers a preferred position because their ever-available milk supply was itself more valuable to the handlers. His action, rather, was based on the nearby producers' "economic position," a position which had enabled them to command higher prices from handlers before regulation and which enabled them to coerce this concession in the marketing order. The reason for this "economic position" was, as the Secretary recognized, "availability *for Class I* use." We are unable to distinguish this

factor from the consideration of historical fluid use patterns condemned in *Blair*.

After passage of the 1937 Agricultural Marketing Agreement Act, Order No. 4 was amended to do away with base-rating. The nearby producer's preferred status was preserved, however, by the payment of farm and delivery location differentials. For the first time, the condition of nearby delivery was dropped from the farm location differential, and the farm location and delivery location differentials were paid cumulatively. The Secretary found only:

> [t]hat in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, *without the use of a base-rating plan, but with the inclusion of special location differentials*, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers.[14]

The farm location differential was designed to reproduce as closely as possible the nearby farmer's preferred position under base-rating. Thus, the differential was (and still is) payable only to the extent that it did not increase the producer's payment above the Class I price.[15] As the Agriculture Department argued in its 1937 Economic Brief:

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[14] 2 Fed. Reg. 1331 (1937) (emphasis supplied).

[15] This feature of the order is similar to a provision of the New York-New Jersey order which we found in *Blair* to indicate the connection between the differential and the prohibited consideration of fluid milk use. We there said:

> . . . that payments vary (inversely) with the extent of fluid milk utilization [in the entire market]. The differential is sensitively attuned to the supposed special place of the nearby producer in the fluid milk market, and is taken away when fluid milk utilization is so high marketwide that he merits no premium based on that special place.

370 F.2d at 237-38. A like interaction between the amount of the differential and marketwide fluid milk utilization is achieved by the provision of the Massachusetts-Rhode Island order that if "the addition of 46 cents gives a result greater than the Class I price . . . there

> It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are predominantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended.

Evenness of production, which was awarded on an individual basis under base-rating, was an alleged advantage of nearby farmers frequently cited by proponents of the differential during the hearings as explaining their historically higher prices. The Market Administrator's explanation is typical:

> The idea is, without regulation over a period of years producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their milk is rather even throughout the year, have been able to obtain a price greater than the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. . . . It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that.

This assertion about seasonality was somewhat undermined by the Department's admission that only two-thirds of the nearby producers could be classified as even, and that "even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors." The principal relevance of evenness was not that it constituted an element of value in the sense of dependability to the handler, but that nearby producers, who as a group contributed less to the surplus in the market, should not share the burden of that surplus by receiving only the blended price. This resort to seasonabil-

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shall be added [only] a rate which will produce that price." Since the blend price itself rises with increased fluid utilization, the amount of the differential necessary to give the nearby farmer the Class I (fluid) price varies inversely with marketwide fluid milk use.

ity, then, was not so much in explanation of historically higher prices but rather in recognition of the fact that the nearby farmers' evenly produced milk had been sold primarily at Class I prices, *i.e.*, for fluid use.[16]

Aside from references to evenness of production and the unfairness to the nearby farmer of disturbing his traditionally preferred market position, the evidence revolved mostly around what would happen if nearby farmers were not favored. The New England Milk Producers Association swore they would "oppose the license with every means in their power," and the witness referred to in footnote 16 made the pregnant observation that "there is always a row in the market unless [the nearby producers] are compensated in some way." One source of their power was also recognized: "We are all within retailing distance of the market and we are potential producer-dealers." This potentiality also underlay the observations in the Department's brief and elsewhere that "their milk is accessible to small dealers." This reference to availability was limited to small dealers as it had not been in the Secretary's finding in the 1936 Order, presumably because only large handlers could afford to bring in their milk from distant farms. That nearby farmers had a captive market, however, does not alone explain the higher price, without the additional fact that the farmers or handlers could dispose of the milk at Class I prices. Economist Ellsworth Bell's brief to the Secretary concisely described this economic advantage:

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[16]This is evident from the 1937 testimony of the president of the Nearby Producers Association, asking for a nearby differential of at least one cent per quart over the blended price:

> Now, we feel that to be protected in our special place in the market requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. [sic] In the second place, we must have somewhere near our differential–our consumer differential over the 200-mile zone, and get that much . . . .

> Being adjacent to markets the [nearby] dairymen command a natural sales advantage whereby it is taken first at the fluid price. . . . [Historical price difference] exists due to peculiar advantages existing for disposal and sale of milk at the higher market price.

In 1949 the Secretary first promulgated orders for the Springfield and Worcester markets, both of which contained nearby farm location differentials. Those in favor of the differentials had given testimony similar to that which preceded the Boston orders, and had argued for uniformity of treatment with the Boston market. In approving the differentials, the Secretary adverted to "the customary market practice of paying somewhat higher prices to producers located near the sales area." These historically higher prices were explained as follows:

> This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product.[17]

Those direct marketing opportunities were, of course, for fluid use at Class I prices.

In 1951 the Secretary held hearings on a proposal to eliminate the nearby differential in the Boston order. Opponents of the differential argued that it constituted a trade barrier; that evenness of production, if compensable at all, should be recognized on an individual basis; that the validity of the differential should be reexamined in the light of contemporary economic conditions; and that if nearby milk has any extra intrinsic value it should be paid for by the handlers rather than by the pool. Proponents of the differential brought out all the old arguments, with somewhat greater emphasis this time on the disruptive market effects of eliminating the differential, and on the unfairness to nearby farmers for whom the nearby differential had become capitalized into greater land values. A major pillar of their argument was the unabashed assertion that in terms of "his-

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[17] 14 Fed. Reg. 7085, 7089 (1949); 14 Fed. Reg. 7097, 7102 (1949).

torical price relationships . . . producers located near the market were able to sell a larger proportion of their milk at Class I." The representative of the Massachusetts Milk Control Board, for example, testified that the differential was not discriminatory but rather had been

> adopted by way of partial compensation to nearby producers for the losses which they suffered when the equalization provisions deprived them of those natural advantages which prior to federal regulation always enabled them to sell at [sic] a relatively higher percentage of their production of Class I milk.

The Secretary concluded that "no change should be made at this time" because the opponents had "presented no material facts different from those considered in establishing specified location differentials as a part of the order provisions."[18]

In the 1958 southeastern New England order, one of those now consolidated into the 1964 Massachusetts-Rhode Island order, the Secretary for the first time gave a detailed economic justification for the nearby differential, which he described as "identical with that employed in adjacent Federal order markets," a characterization which includes the New York-New Jersey order invalidated by us in *Blair*:

> Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling system herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however,

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[18] 16 Fed. Reg. 9250, 9255 (1951).

he obtains the benefit of an established Class I price which may be higher than in the absence of regulation and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without market-wide equalization.

The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization.[19]

This rationale—which is clearly reflected in the 1964 order's language about "historical price relationships by location"—is indistinguishable from that advanced the year before in support of the 1957 New York-New Jersey order condemned by this court in *Blair v. Freeman*.[20]

The testimony at the hearings preceding the 1964 order served mainly to reinforce the Secretary's reliance on historical fluid use patterns as the primary justification for the

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[19] 23 Fed. Reg. 8238 (1958).

[20] The following year an identical provision was incorporated in the Connecticut order. It was proposed that this order be consolidated in the 1964 Massachusetts-Rhode Island order. It was not, but there is no indication that the Secretary viewed the nearby differential in Connecticut as in any way different from those under other Federal marketing orders:

> The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets.

24 Fed. Reg. 1049, 1063 (1959).

nearby differential. Most of the witnesses in favor of retaining the differential either ignored, or rejected as irrelevant, the question of whether it had ever been authorized under the Act. Their testimony dwelt upon the absence of adverse economic effects of the differential, and the dire consequences which would flow from its elimination. When their attention was directed to the issue of the differential's original justification, some reiterated the testimony of 1937 to the effect that the differentials recognized the evenness of production of nearby milk and its accessibility to small dealers; that the nearby farmers enjoyed a favorable bargaining position because of their ability to become producer-dealers; and that the differential was a necessary compromise to win the support of the nearby farmers and Massachusetts Milk Control Board for the federal order.

Almost to a man, however, the witnesses at the hearing testified—and no one denied—that the principal reason for the differential was to preserve for nearby producers their traditionally high percentage of the fluid use market. One witness even argued as follows for an increase in the nearby differential:

> We don't feel that these market pools were set up to make it possible for distant milk to take the Class I sales that rightfully belong to nearby farmers away from them. Again I think you have to consider the use value of the milk in determining the prices to the producers.

And a committee report specially prepared for the Department of Agriculture in 1962 was read into the record. While nearby milk was claimed to have various advantages, the report concluded that:

> the major purpose of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool.

In view of the concurrence of all concerned—including on occasion the Secretary himself—that the differential was a recognition of historical use values, we find it impossible to

conclude that the Secretary did not rely on this illegal consideration in approving the 1964 order as well as all of its predecessors. Although in patent conflict with the blended price regulatory scheme propounded by Congress, it was apparently thought that the resulting distortion was a price necessary to be paid in order to get sufficient agreement to support a marketing order, and that it was better to pay that price than to have no order at all.

III

Section 4 of the 1937 Agricultural Adjustment Act provided:

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.[21]

Appellants argue that, since nearby differentials appeared in the Greater Boston order before 1937, Section 4 immunizes the farm location differential from invalidation under another section of the Act.[22] We find this contention unpersuasive for several reasons.

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[21] 50 Stat. 249 (1937).

[22] Appellants argue alternatively (1) that nearby differentials, even if inconsistent with Section 8(c)(5), were legalized by Section 4; or (2) that Section 4 constituted a legislative determination that every feature of extant federal licenses or orders before 1937 fell under one or more of the enabling provisions of the Act—in particular, that the nearby differential was a market or location differential within Section 8(c)(5). In support of this latter construction, appellants point to language in the Committee Reports underlying the 1935 amendments to the effect that "these terms [of Section 8(c)(5)] follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act [of 1933] and the

First, it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937. There were differentials based on *delivery* location, and for a time farm location was one condition along with delivery location, but none seems to have been based on farm location alone. Moreover, the differential was never one payable over and above the transportation differential available to distant producers who delivered to a nearby zone.[23]

Second, Section 4 itself ratifies only those provisions and acts which were "done under the Agricultural Adjustment Act." This qualification negates any inference that Congress intended to sanction orders which were illegal under other sections of the Act. And this construction is consistent with what was clearly the sole legislative purpose underlying Section 4, namely, to prevent technical abatements which arguably might result from reenactment of the 1933 Act. In *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court had invalidated certain of the production control provisions of the 1933 Act; and several lower courts, construing these provisions as not severable, thought that the marketing agreement and order sections must also fall. Section 1 of the 1937 Act specifically reenacted the latter provisions of the Act in order to avoid that result.[24] Congress feared, however, that such reenactment might itself be construed as suggesting that, pending its accomplishment, the Act, and all actions taken by the Secretary under its aegis, had been illegal. Hence Section 4 of the 1937 Act.[25]

provisions of licenses issued pursuant to the present [Act]. . . ." H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9 (1935).

[23] See the descriptions of the licenses and orders, pp. 7-8, 10-11 *supra*.

[24] 50 Stat. 246 (1937).

[25] The House Report stated:

> Section 4 . . . negatives any implication that [the bill's] effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action.

H.R. Rep. No. 468, 75th Cong., 1st Sess. 4 (1937).

Appellants further assert that the legality of the farm location differential was established in 1939 by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc. v. United States*, 108 F.2d 342 (1st Cir. 1939). That case began as an action by the United States and the Secretary of Agriculture seeking a marketing injunction requiring the defendants, a group of milk *handlers*, to comply with Order No. 4 regulating milk marketing in the greater Boston area. One of the defenses was that the farm location differential was not authorized by Section 8(c)(5). After holding that *handlers* had no standing to raise this defense, the court volunteered the view that the differential could be justified under the Act either as a delivery location differential or a "market differential customarily applied."[26]

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[26]The court's rationale was as follows:

> There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8(c)(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

108 F.2d at 346.

We took note of the *Green Valley* opinion in *Blair*, where it was also pressed upon us as dispositive; and at that time we expressed our disagreement with the First Circuit's analysis.[27] In any event, the opinion in that case could not control the outcome here. In the first place, only one of the orders which was consolidated into the Massachusetts-Rhode Island order in 1964 was under attack in *Green Valley*. Moreover, the defendants in that case were all handlers, and there was no representative of the class of non-nearby producers before the court. Indeed, as we said in *Blair*, the approval of the differential was a *dictum*, since "the court's holding was that the handlers lacked standing to challenge the disposition of the producer settlement fund."[28] We must conclude, therefore, that neither Congress nor the courts have validated the farm location differential of the Massachusetts-Rhode Island order.

IV

Appellants insist that, even if the Secretary had in the past relied upon historical fluid use patterns, there are other legitimate legal and factual grounds for the farm location differential. Therefore, they urge, the court should, before striking the provision from the order, in effect remand the case to the Secretary for an opportunity to offer a more explicit justification for the differential. We are not impressed with this suggestion since we do not think that a court should, in the face of what it finds to be a clear and continuingly burdensome statutory violation, albeit one of long standing, defer a declaration of its illegality. We are especially not disposed to do so where there appears to be no serious possibility of finding warrant in the statute for a preference based solely on farm location.

We need not speculate as to what the Secretary would do upon such a remand, for he has already, since our decision in *Blair* and the judgment of the District Court in this case,

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[27] 370 F.2d at 238.

[28] *Id.* at 238, n. 34.

issued a recommended decision on the farm location differential in the Massachusetts-Rhode Island order. He there concluded after further hearings on the subject that the nearby differential "should be continued." He noted that nearby farmers had received higher prices "prior to the advent of federal regulation," that this advantage had been preserved in the base-rating plans of the federal licenses and 1936 Boston order, and that it had been carried over into the nearby differential of the 1937 order. The Secretary quoted from the 1937 record to the effect that the historically higher price was:

> due to the fact that their production is relatively even, and that their milk is accessible to small dealers . . . . If we should take away from these producers a differential that they have been able to get without Government regulation, they would have a legitimate objection that we are placing them at a comparative disadvantage. . . .[29]

The fact of historically higher prices is, of course, not alone sufficient. The reason for that difference must not, under the Act, have been related to sales advantages for fluid use. To avoid this pitfall, the Secretary assigned two other explanations for the high prices: availability and evenness of production. The former is not a legitimate factor. To the extent that it reflects the nearby producers' ability to become distributors directly to the consumer, it is no more than an aspect of the high fluid utilization advantage. To the extent that availability means dependability and ease of access, it is, as we held in *Blair*,[30] and as the Secretary himself recognized in the New York-New Jersey order,

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[29] 32 Fed. Reg. 9902, 9919 (1967)

[30] If this history has any current significance, if the milk has greater "value" to the handler for reasons other than quality and location of delivery, it may be a reason for the producer to receive out of the handler's own pocket a premium above the minimum price, but this would not be a justification permitted by the law for a diversion from [distant farmers] of their equal share of the blended uniform minimum price adjusted only for the statutory differentials.

370 F.2d at 238-39.

"related to the extra value of such milk to the handler who buys it rather than to producers generally and [is], therefore, . . . payable by handlers rather than out of the pool."[31] Nor would evenness of production appear to support a differential based on farm location. While nearby production may as a general matter be more even, there have been wide individual variations in seasonality throughout the milkshed. Moreover, as the Secretary stated in his New York-New Jersey decision,[32] uniform supply should be compensated on an individual basis. The Act makes provision for base-rating,[33] and it appears to be the only sanctioned method by which to stimulate and compensate even production by individual farmers.

None of the differentials permitted by the Act contemplate in terms preferential treatment on the basis of farm location.[34] A dual legal justification for the nearby differential, was, however, offered in the 1967 recommended decision:

> Clearly . . . these greater returns . . . were, in the language of the statute "market differentials customarily applied by the handlers." . . . Inasmuch as these greater returns for milk were directly related to geographical source, it was considered that these differentials were also adjustments based on "location" . . . within the meaning and context of [the Act].[35]

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[31] 22 Fed. Reg. 4194, 4213 (1957).

[32] *Id.*

[33] 7 U.S.C. § 608c(5)(B) (Supp. 1967).

[34] While the Secretary relies only on the provisions for market and location differentials, the other appellants have attempted to justify the nearby differential as a "volume" or "production" differential. The Committee Reports, however, show those exceptions to be clearly inapt. H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9-10 (1935).

[35] 32 Fed. Reg. 9202, 9919 (1967).

But the only "location" differential permitted by the Act is one for "the location at which delivery" of the milk is made to the handler. Plainly, this exception was designed to recognize differences in transportation costs only, and does not encompass a preference based solely on farm location.[36]

Nor is farm location comprehended within the provision for "market . . . differentials customarily applied by the handlers." The Committee Reports in respect of the 1935 Act are explicit that "the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant."[37] This adjustment, of which the "country station" differential of the 1936 greater Boston order was an example,[38] recognized the savings in handling costs when milk in fluid form is delivered to the city rather than first to a country plant. Provision is now made for this differential in the Massachusetts-Rhode Island order as a fixed portion of the zone differential.[39] As we held in *Blair*,

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[36]It may be that in authorizing a location differential in 1935, Congress intended to preserve the preferences enjoyed by nearby farmers under pre-1935 federal licenses and under voluntary agreements before any federal regulation. Those preferences, it appears, were phrased in terms of location of *delivery* (or delivery plus farm location), and it was generally true at that time, as the First Circuit noted in *Green Valley* (see n. 26 *supra*), that delivery and farm locations coincided fairly closely. It is probably safe to guess that not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the nearby differential be based solely on farm location.

[37]H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

[38]See p. 7 *supra*.

[39] The purpose of establishing zone differentials is to achieve a high degree of uniformity in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at various distances from the principal consumption area. To achieve this purpose, the zone differentials must closely

> it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk. The "market differential" rationale is plainly not a tenable basis for the nearby differential.[40]

On August 2, 1968, the United States District Court for the Northern District of New York elected to treat a nearby differential of the kind here in issue as a "market differential." *Cranston v. Freeman*, ___ F.Supp. ___. It recognized that the result it reached was directly in conflict with our decision in *Blair*, but it went on to say that while it "concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in [that Court's] conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market." In other words, although Congress authorized a price pooling arrangement in order to eliminate revenue disparities among producers due to varying access to the fluid milk market, those who enjoyed that advantage before pooling must continue to have it because a larger percentage of their production customarily goes into fluid milk use. This is, of course, precisely what the Secretary gave as his primary reason for including the nearby differential in the Connecticut marketing order involved in *Cranston*:

> Provision should be made also for the payment of a market differential to producers in the nearby supply area. The monies for the payment of these differentials will be obtained by a deduction from the total value of all milk before completing the computation of the market-wide uniform price.
>
> . . . .
>
> Milk received from the nearby area has long represented the major part of the total Connecticut supply.

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reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants.

29 Fed. Reg. 11205, 11210 (1964).

[40] 370 F.2d at 238.

The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated market. *The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.* (emphasis added) 24 Fed. Reg. 1049, 1063 (1959).

The *Cranston* court does not, therefore, sustain the nearby differential on some reason other than that relied upon by the Secretary in propounding it. It, rather, embraces fully the Secretary's persistent assumption that Congress did not really mean what it said about end-use not being allowable as a factor in fixing the amount received for milk by the producer.[40.1] The *Cranston* court's acceptance of the "market differential" rationale thus flies in the face of the congressional purpose explicit in the statute, as well as the

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[40.1] The *Cranston* court purports to find some comfort in the 1939 decisions of the Supreme Court in *Hood* and *Rock Royal*, note 3 *supra*. As to the former, however, *Cranston* concedes that the Supreme Court "omitted any specific discussion of the farm location differentials" which had been challenged in the District Court—an omission of which Judge Magruder said in *Green Valley:*

> These points were raised in the District Court in the Hood and Whiting Milk cases but were not pressed before the Supreme Court. Hence, they are still open for consideration here.

108 F.2d 342, 344 (1939).

Rock Royal did not involve producers, but only handlers and therefore a different provision of the statute. Moreover, the differential payments there involved depended upon the location of the plant to which delivery was made, and not the location of the delivering farmer.

flat language of the Senate and House Committee Reports defining "market differential." *See supra* p. 23.

Even if the farm location differentials cannot be saved, appellants' argument continues, the case should be remanded to the Secretary so that he can determine whether other amendments are necessary and whether the order, without a nearby differential, effectuates the declared policy of the Act.[41] Appellants rely in this regard upon cases such as *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944), and *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952).

Those decisions do enunciate the principle that a court cannot always assume that an agency, had it been aware of the limits of its authority, would have promulgated an order differing only in the absence of the provision judicially declared unlawful. That principle, however, does not obtain here. The 1964 order contains an explicit severability clause, clearly indicating that all parties contemplated that judicial invalidation of some provisions would not upset the remainder. Moreover, unlike the provisions involved in *Addison* and *Idaho Power*, the nearby differential is discrete. There is nothing to suggest that elimination of it irretrievably impairs the Secretary's power and purpose to administer the significant regulatory scheme embodied in the remaining provisions of the order. He has simply been told to discontinue illegal payments under the order. Since any discrimination attributable to farm location

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[41] The nearby farmers also argue that, since the nearby differential is a key provision of the order, its invalidation effectively invalidates the entire order until the Secretary has readopted it *and* it has been approved in a referendum by two-thirds of the producers in the market. The Secretary, however, rejects this construction, relying on the following severability provision in the order:

> If any provision . . . is held invalid, the application of . . . the remaining provisions . . . shall not be affected thereby.

7 C.F.R. § 1001.96 (1968).

would appear to be invalid, there is no reason to afford him a chance to disburse them under a different name.[42]

V.

Although we affirm the judgment of the District Court, we must deal with the distant producers' claim of equitable entitlement in respect of the escrow fund.[43] The complaint was filed on December 27, 1966, and the escrowing commenced with the preliminary injunction of January 16, 1967. Final judgment was entered by the District Court on June 15, 1967. In the exercise of our duty, as a court of equity, to "tailor . . . relief with a critical and balanced view of the ramifications of [the] decision,"[44] we have decided that the monies escrowed before June 15, 1967 should be disbursed to the nearby farmers and that the distant producers are entitled to amounts thereafter collected.

In support of their claim, the nearby producers point out that the nearby differential was in operation for almost 30 years before it was challenged in court and that the

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[42]The injunction is prospective only; the Secretary and the producers can do what they wish with the order hereafter. Unlike the situation in *Idaho Power*, the District Court's injunction did not constitute a command that the Secretary continue the order without the illegal provision. And, since there will be no retroactive recovery in this case, the injunction, as compared with the decision of the circuit court in *Addison*, has no impact on rights arising from events which occurred before the date of the court's judgment.

[43]We do not think the case need be remanded—as all appellants urge—for either the Secretary or the District Court to determine in the first instance the equitable distribution of the escrow fund. Further delay is unnecessary, the facts are not in dispute, and neither possesses a peculiarly informed discretion on this question to which this court should defer.

[44]370 F.2d at 239.

nearby farmers have relied upon it over that period in making economic decisions and investments.[45] In particular, they allege reliance upon the First Circuit's decision in

[45] Both the Secretary and the nearby farmers had relied heavily on this line of argument in the 1964 and 1967 decisions and the 1964 hearings. Thus, the principal reason advanced for continuation of the nearby differentials was that they were "deeply embedded" in the New England milk marketing structure; to remove them would be grossly unfair to nearby producers who had relied upon them in voting for the order originally and in negotiating loans and making capital commitments. The nearby differentials had, it was asserted, become capitalized into land values; and if the differentials were to be abandoned or reduced, then it should be accomplished very gradually. Moreover, some witnesses predicted that if the differentials were removed, nearby producers would overproduce to make up for lost revenues, or even worse, they would be forced out of business by high local production costs—an event which must be forestalled in order to preserve an adequate supply of nearby milk and therefore greater economy for the urban consumer. Others hypothesized that nearby producers, deprived of their price advantage under the federal order, would go into business as producer-dealers, thereby removing many Class I sales from the pool and lowering the blended price. Such a development would also force out of business the small dealers who cannot economically import distant milk and who rely on nearby sources, this in turn would contribute to the undesirable trend toward monopolization in the distribution of milk. Finally, the Secretary was warned of the catastrophic inter-market dislocations which would accompany elimination of the nearby differentials. Such a step would attract vast supplies of milk from the surrounding areas, flooding the New England markets and eventually depressing the price. The Secretary was clearly much impressed with this line of testimony. In his 1967 recommended decision he noted that "the business decisions of nearby producers have been influenced over the years by the higher returns," and that the differential would "promote orderly marketing of milk in the Boston area, and prevent disruption in the normal supplies of milk for the Boston area and thus tend to effectuate the declared purposes and policies of the Act." 32 Fed. Reg. 9902, 9919 (1967).

We are not insensitive to the Secretary's efforts to preserve the public interest in the vastly complex regulation of milk marketing. As we said in *Blair*, however, "this may be a reason for the legislature to enlarge the Secretary's powers, but not for the court to overlook the limited nature of the authority hitherto conferred by Congress." 370 F.2d at 239.

Green Valley.[46] Because it was, in language at least, an explicit judicial approval of the farm location differential, they suggest that the payments should not be terminated until the differential has finally been determined invalid by a court of at least equal rank in the federal judiciary.

We recognized in *Blair* that the plaintiffs' long acquiescence in the differential and their years of enjoyment of a blended price and stable marketing conditions in the milkshed were significant factors bearing upon their entitlement to equitable relief. In view of these factors, the nearby farmers could legitimately have expected to receive, and the distant farmers to pay, the differential until it has been held invalid, after full opportunity for the presentation of views on both sides, by a court. We think this is a fair view of the equities; and, since a preliminary injunction does not constitute a final judgment on the merits, appellant producers should receive the amounts escrowed between January 16 and June 15, 1967.

We are not persuaded that the endorsement of the nearby differential in *Green Valley* further alters the equities between the parties. The nearby producers' reliance on that opinion is amply recognized by preserving their preference until it has been finally invalidated by a responsible court having jurisdiction to do so. Their expectations cannot seriously be said to encompass a decision to that effect by a Court of Appeals but not by a District Court.

The judgment appealed from is affirmed and the case remanded to the District Court for further proceedings consistent herewith.

It is so ordered.

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[46] In his 1967 recommended decision, the Secretary noted that he too had relied on *Green Valley:*

> It was subsequent to, and substantially in reliance upon, this decision that farm location differential provisions were considered to be legal and proper for inclusion in other New England orders.

32 Fed. Reg. 9902, 9920 (1967).

[Filed Sept. 23, 1968]

[Caption Omitted in Printing]

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is affirmed, and these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Curiam

For the Court:

Nathan J. Paulson,

Clerk

Dated: September 23, 1968

[Filed Oct. 15, 1968]

[Caption Omitted in Printing]

RESPONSE TO APPELLANTS' OPPOSITION TO APPELLEES' BILL OF COSTS

The appellees respectfully say as follows in response to the appellants' Response (Opposition) to the appellees' bill of costs:

1. The appellees regret the necessity for this Response to an unnecessary Opposition to the appellees' bill of costs. They believe that counsel should attempt to resolve such matters in good faith, and they are of the respectful opinion that minutiae of this nature should not burden the Court, the Clerk, or themselves.

2. The appellees note that appellants were denied intervention by the district court and that this Court denied their

motion for summary reversal of such denial of intervention. The appellants were only allowed to enter this case for the purpose of taking an appeal, in that it did not appear that the defendant Freeman was going to appeal the lower court's judgment. Under such circumstances, it would appear that appellants take the record as they find it, particularly when they were given repeated opportunities to bring any defenses, objections, or other matters to the attention of the district court as *amicus curiae* in the case. Additionally, defendant Freeman never really objected below to any of the material to which these appellants object, nor did appellant *Freeman* object to the inclusion of such material into the Joint Appendix that he utilized in No. 21,308, consolidated herewith, *without contributing anything to the cost thereof.* Under these circumstances, it is respectfully submitted that neither appellant has standing or ground for opposing the appellees bill of costs. If these appellants have any quarrel, it is properly with the appellant *Freeman* and not with the appellees.

3. The appellees believe that it is particularly indefensible for these appellants to burden the appellees, the Clerk, and the Court with a proposal for the apportionment of costs of the appendix that is patently improper and unbecoming of counsel, in that appellants state as follows in paragraph (e) on pages 3 and 4 of their Opposition:

> "(e) If the costs of printing the 100 pages is *assumed* to be roughly proportionate to the total cost of printing the Joint Appendix, then Appellees should bear in any event the cost of printing the 100 pages in the amount of $985.60 (100/323 x $3,183.47 = $985.60). The taxing of the remaining costs of printing the Joint Appendix should await disposition by the Supreme Court of Appellants' petition for certiorari."

It is clear that appellants seek to evade printing costs by means of an improper assumption and through the above inventive "computation". The 100 pages to which the appellants refer (p. 223-323) is almost all straight printing and virtually devoid of tabular and like material that was extensively designated by the appellants. (*Pages 199-206 of the appendix is a*

good example). Appellants' printer charges $6.90 per page, but the appellants seek to charge appellees $9.86 per page and to force the appellees to bear the cost of covers, tabular material, etc., that is the responsibility of appellants. This proposal is deemed unworthy of the time of appellees, the Clerk, and the Court, and it bears great resemblance to the tactic of appellant Freeman in No. 21308 wherein he delayed his appeal and utilized the joint appendix filed herein.

4. The letters on file disclose that appellees refused to print cross-examination with the direct testimony of witnesses in the joint appendix and insisted that such direct testimony and cross-examination be printed in separate appendixes. After appellees brought this to the attention of the Court, the appellants then agreed to print such matter in logical sequence and to pay for the printing of the administrative records. They subsequently reneged on this promise after the printing was completed in order to avoid payment therefor, and the reason given for such disavowal was so patently inaccurate that it cast a further adverse reflection on appellants. This resulted in appellants' printer billing the appellees for material that the appellants had agreed to print at their expense.

5. Additionally, the printing of most of the 100 pages to which the appellants refer was rendered necessary in order to prevent misstatements to this Court by both appellants, and an examination of the appendix evidences this obvious fact. For instance, pages 236-244 set out major admissions contained in the Secretary's brief filed in the *Blair* case, including references to the milk order provision involved in this case. Such brief, filed as an exhibit below, also acknowledged that the Secretary had always interpreted or regarded a "market" differential as being identical with that defined in the Congressional reports that were quoted by the Secretary in said brief, although both appellants disaffirmed such "long-standing contemporaneous construction" of the provision of the Act in this case.

Page 263 sets forth a "Designation" of the pertinent pages of the promulgation hearing record relating to the nearby dif-

ferential. Appellants cited many matters in this Court that they refused to bring before the lower court through a brief *amicus curiae*, and the said designation of the pages of the administrative record was made to preclude the appellants from claiming in this Court that they had no real opportunity to file such brief below because of lack of the administrative record designation. Pages 273-74 of the appendix sets forth a letter to appellants' counsel advising that appellees consent to the filing of such a brief, and page 272 sets forth a letter in which appellees inquired as to whether appellant Freeman regarded any other administrative hearing record as necessary in the district court for decision of the case. (Both appellants later maintained in this Court that all of the necessary hearing records were not before the district court.)

The said letter also referred to the filing of a part of the Economic Brief of the USDA in the district court, and the 1937 brief related to the Government's conception of proper equalization and marketwide pooling of milk. This relevant material was accepted without objection, and it is included in the appendix at pages 318-23 thereof.

The summaries of the early administrative hearing records are entirely factual, rather than argumentative, and no objection was ever made to their filing in the district court. Moreover, their accuracy was underscored by the fact that the defendant's attorneys refused to file such early administrative records after being served with such summaries and after the certification of such administrative records by the Secretary. This latter fact is shown by the affidavit on pages 306 of the Appendix that the administrative records were certified and delivered to government counsel by the Office of the Hearing Clerk, USDA. The said 100 pages of the Appendix also lists an Opposition to a motion (pp. 244-62) that evidences the inconsistency of the defendant's position in seeking to hold the proceedings in abeyance after he had advised months before that he was ready for final hearing. The matters therein were directly relevant to the very arguments made by both appellants concerning "primary jurisdiction", administrative reme-

dies, etc., and the defendant's motion to which such Opposition relates is also set forth on pages 48-50 of the Joint Appendix—the appellants not objecting to this designation or others in the other part of the Appendix at this time. The memoranda or points and authorities to which appellants object is found in two paragraphs on pages 263-64 of the Appendix, consisting of excerpts from the *defendants* points and authorities and which sets forth relevant factual data rather than argument. In view of the fact that the appellants were contesting the basis for the lower court's action, the appellees designated their Reply to the defendant's Opposition to a proposed Order granting summary judgment. The only other matter contained in pages 221-323 of the Appendix is the *defendant's* Opposition to the motion for preliminary injunction, the plaintiffs' Motion for Summary Judgment and Statement of Material Facts As To Which There Is No Genuine Issue, and the plaintiffs' points and authorities supporting the aforesaid motion. Such points and authorities cover but three pages of the appendix, and the appellees are willing to sustain the cost of this printing for the reason that such material was furnished to the printer in error. It pertains to the *Blair* case, and this fact is evident from a reading of such material and the unnatural manner in which it ends.

It should be noted that the record certified by the appellant *Freeman* contained numerous briefs or memoranda filed at the administrative hearings, and both appellants and the Court refer to such matter. The necessity and relevancy of all of the material printed at pages 221-323 of the appendix is apparent from a reading of the briefs of both appellants, in that virtually all of the matters designated by appellees are referred to in such briefs. (The early Boston milk orders, the entry of summary judgment in the lower court on the basis of *Blair*, the entry of the preliminary injunction and orders regarding escrow of the differential payments, and other matters are all referred to in appellants' briefs. Not one factual error was pointed out at any time in respect to the summaries of the administrative records relating to the nearby differential, and the appellants' complaint is that such summaries precluded an

inaccurate presentation of the contents of such administrative records and resulted in the appellant Freeman's decision not to file such certified record under those circumstances. Appellants then cited briefs in other cases in a totally inaccurate manner in an attempt establish their contentions that could no longer be presented through the administrative records that appellant Freeman certified but did not file.) The appellees respectfully submit that the relevant criterion in respect to the printing of any material in the appendix is whether it is necessary or helpful to a correct determination of the appeal, and both appellants fail to mention this factor for obvious reasons.

6. The appellees respectfully say that the appellants are totally in error in requesting that costs not be taxed against them until disposition of the intended application for certiorari, and Rule 39(d), F.R. App. Proc., states as follows:

> "The clerk *shall* prepare and certify an itemized statement of costs taxed in the court of appeals *for insertion* in the mandate."

Whether the mandate is actually stayed is a separate question, and the possible application for a writ of certiorari is not ground for qualification of the Rule or for delay in the taxing of costs. The Rules are statutory in nature and unlike the local court rules where discretion is often utilized in applying the same.

The appellees again say that they regret that the Court and the Clerk, as well as themselves, are unnecessarily burdened with this type of matter, particularly after the Court's exhaustive treatment of the appeal and its attempt to effectuate an equitable disposition thereof that would preclude additional litigation.

Wherefore, appellees respectfully request that they be accorded their costs through immediate taxation of the same against the appellants and in conformity with the amounts that they were forced to incur for the expenses of the appellants' appeals.

[Subscription Omitted in Printing]

[Filed Dec. 2, 1968]

[Caption omitted in printing]

ORDER

On consideration of Appellees' bills of costs filed in the above-entitled cases and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that Appellees' bills of costs are approved.

Per Curiam

[Filed Dec. 2, 1968]

[Caption Omitted in Printing]

ORDER

On consideration of Appellants' motions to stay transmittal of this Court's mandate and to continue the escrow arrangements in the above-entitled cases, and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that the Clerk is directed to stay the transmittal of the opinion and certified copy of this Court's judgment for the period of time permitted by law for the filing of a petition for writ of certiorari and it is

FURTHER ORDERED by the Court that Appellants' motions to continue the escrow arrangements in the above-entitled cases until either the Solicitor General determines that certiorari will not be sought by the Secretary of Agriculture, or if certiorari is sought, until disposition of the cases by the Supreme Court are granted.

Per Curiam

Supreme Court of the United States

No. ---------- , *October Term, 19* 68

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,

Petitioner,

vs.

RUSSELL ALLEN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 20, 1969.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 14th day of December, 19 68.

Grant of writ of certiorari issued on April 7, 1969

The petitions for writs of certiorari are granted. The cases are consolidated and a total of two hours is allotted for oral argument. Mr. Justice Marshall took no part in the consideration or decision of these petitions.

EXCERPTS FROM THE ADMINISTRATIVE RECORD CERTIFIED AND FILED WITH THE DISTRICT COURT ON MARCH 20, 1963

Portions of 1935 Hearings and 1936 Order

Order Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area

Issued by the Secretary of Agriculture February 7, 1936
Effective 12:01 a. m., E. S. T.,
February 9, 1936

• • • • • • • • • • •

Whereas, the Secretary finds, upon the evidence introduced at the aforementioned hearings:

1. That in 1934, 90.8 per cent of the total volume of milk sold in the Greater Boston, Massachusetts, Marketing Area, originated in states other than Massachusetts and entered into the current of interstate commerce; that the milk originating in the State of Massachusetts is inextricably intermingled with that milk which is in the current of interstate commerce, and in such a manner that it is impossible to regulate that milk originating in states other than Massachusetts without regulating that milk which originates in the State of Massachusetts and which enters the current of interstate commerce; and that the handling of milk in the Greater Boston, Massachusetts, Marketing Area is in the current of interstate commerce, or directly burdens, obstructs or affects interstate commerce.

2. That the classification of milk into two classes follows a custom of long-standing in the market and is an economically justifiable method of classifying milk;

3. That the prices received by producers for milk sold in the marketing area were, for a long time prior to said hearings, at a level that gave such milk a purchasing power with respect to articles that producers buy considerably below the purchasing power in the base period; that the prices established in this order will, over a period of time,

tend to give such milk a purchasing power with respect to articles that producers buy equivalent to the purchasing power of such milk in the base period; that the establishment of such prices does not have for its purpose the maintenance of prices to producers above the level which is declared in the act to be the policy of Congress to establish; that the differential in prices to associations of producers, and producers, is justified as a reasonable allowance for services actually performed by associations of producers; that the differential in price between milk delivered from producers' farms to handlers' plants located not more than forty miles from the State House in Boston and to plants located more than forty miles from the State House in Boston is a reasonable allowance for the extra handling costs incurred by handlers operating country station plants; and that the method provided for determining the class II price is a method which bears a reasonable relationship to the price of cream in the above market;

4. That the determination of uniform prices to producers and the payment of such prices through a market-wide equalization pool founded upon a base-rating plan is a fair and reasonable method of distributing to producers the proceeds of sales to handlers; that the country station, transportation, butter fat and other differentials are proper differentials to be used in calculating such prices; that the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, due to the greater availability of their milk for class I use; and that the method of calculating the bases of all producers is a fair and reasonable method;

• • • • • • • • • • •

Article IV—Minimum Prices

Section 1. *Class I Prices to Associations of Producers.*—Each handler shall pay any association of producers for Class I milk containing 3.7 percent butterfat, subject to the butterfat dif-

ferential set forth in section 3 of article VIII, not less than the following prices:

1. $3.42 per hundredweight for such milk delivered from the plant of such association to such handler's plant located not more than forty (40) miles from the State House in Boston; and

2. $3.37 per hundredweight for such milk delivered from the plant of such association to such handler at a railroad delivery point not more than forty (40) miles from the State House in Boston.

Sec. 2. *Class I Prices to Producers.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class I milk delivered by them, not less than the following prices:

1. $3.30 per hundredweight for such milk delivered from producers' farms to such handler's plant located not more than forty (40) miles from the State House in Boston;

2. $3.09 per hundredweight for such milk delivered from producers' farms to such handler's plant located more than forty (40) miles from the State House in Boston, less an amount per hundredweight equal to the freight from the railroad shipping point for such handler's plant to such handler's railroad delivery point in the Marketing Area. Such freight shall be calculated according to applicable rail tariffs for the transportation in carload lots of milk in forty-quart cans and each such can shall be considered to contain 85 pounds of milk.

Sec. 3. *Class II Prices.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class II milk not less than the following prices per hundredweight:

1. In the case of such milk delivered to a handler's plant located not more than forty (40) miles from the State House in Boston, a price which the Market Adminstrator shall calculate as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered,

multiply the result by 3.7, add 10 cents and subtract 23 cents; and

2. In the case of such milk delivered to a handler's plant located more than forty (40) miles from the State House in Boston, the price calculated by the Market Adminstrator, pursuant to paragraph 1 of this section, minus six (6) cents.

Sec. 4. *Sales Outside the Marketing Area.*—The price to be paid by each handler to associations of producers or to producers, in the manner set forth in article VIII, for milk utilized as Class I milk outside the Marketing Area, shall be the price applicable pursuant to sections 1 and 2 of this article adjusted by (a) the difference between such applicable price and the price ascertained by the Market Administrator as the prevailing price paid by processors for milk of equivalent use in the market where such Class I milk is utilized and (b) the difference between the freight allowance, if any, set forth in paragraph 2 of section 2 of this article and an amount equal to the carload freight rate approved by the Interstate Commerce Commission for movement of milk in 40-quart cans from the shipping point for the plant where such Class I milk is received from producers to the railroad delivery point serving the market where such Class I milk is sold; provided, that (1) if the market where such Class I milk is utilized is less than ten (10) miles from the plant where such Class I milk is received from producers, the railroad shipping point for such plant shall be presumed to be the railroad delivery point serving such market, and (2) if the market where such Class I milk is utilized is located in Barnstable, Plymouth, Norfolk, Dukes and Nantucket counties, Massachusetts, such handler's railroad delivery point in the Marketing Area shall be considered to be the railroad delivery point serving such market.

Sec. 5. *Publication of Class II Price.*—On or before the fifth day after the end of each delivery period, the Market Administrator shall publicly announce the Class II price in effect for such delivery period.

* * *

Article VII—Determination of Uniform Prices to Producers

Section 1. *Computation of Value of Milk for Each Handler.*—For each delivery period the Market Administrator shall compute, subject to the provisions of article VI, the value of milk sold or used by each handler, which was not purchased from other handlers, by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to sections 2, 3 and 4 of article IV and (b) adding together the resulting value of each class.

Sec. 2. *Computation and Announcement of Uniform Prices.*—The Market Adminstrator shall compute and announce the uniform prices per hundredweight of milk delivered during each delivery period in the following manner:

1. Combine into one total the respective values of milk, computed pursuant to section 1 of this article, for each handler, who made the report as required by section 1 of article V for such delivery period and who made the payments required by article VIII for milk received during the delivery period next preceding but one;

2. Add the total net amount of the differentials applicable pursuant to section 4 of article VIII;

3. Subtract the total amount to be paid to producers pursuant to paragraphs 2, 3, and 4 of section 1 of article VIII;

4. Divide by the total quantity of milk which is included in these computations and which is not in excess of the total of the respective bases of producers whose farms are located more than forty (40) miles from the State House in Boston;

5. Subtract not less than four cents (4¢) nor more than five cents (5¢) for the purpose of retaining a cash balance in connection with the payments set forth in paragraph 5 of section 1 of article VIII;

6. Add an amount which will distribute, pursuant to section 3 of this article, any cash balance available; and

7. On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of

these computations as do not disclose information confidential pursuant to section 8d of the Act, (b) the blended price per hundredweight which is the result of these computations and (c) the Class II price.

Sec. 3. *Distribution of Cash Balance.*—For each delivery period, the Market Administrator shall distribute, by an appropriate addition pursuant to section 2 of this article, the cash balance, if any, in his hands arising out of payments from handlers (to meet obligations arising out of paragraph 5 of section 1 of article VIII) during the delivery period next preceding but one.

Sec. 4. *Base Rating.*—The base of each producer shall be a quantity of milk for each delivery period calculated in the following manner: Multiply the figure determined pursuant to the applicable paragraph of section 5 or section 6 of this article by the number of days on which such producer delivered milk during such delivery period.

Sec. 5. *Bases through March 31, 1937.*—For calculating, pursuant to section 4 of this article, bases to be in effect up to and including March 31, 1937, the Market Adminstrator shall determine with respect to milk, or the milk equivalent of cream, delivered in bulk to processors from the farm operated by such producer:

1. In the case of each producer for whom the necessary information is submitted to the Market Administrator with respect to, and from whose farm some milk or cream was delivered in bulk to processors in, each month of one or more of the calendar years 1933, 1934 and the year ending September 30, 1935, that figure which is highest of the following six (6) calculations, or such of these six (6) calculations as are possible from available information: the average delivery per day during the quarter in which the average delivery per day was lowest of the four quarters, respectively, in the calendar year 1933, the calendar year 1934 and the year ending September 30, 1935; or 75 percent of the average delivery per day, respectively, during the calendar year 1933, the calendar year 1934 and the year ending September 30, 1935.

2. In the case of each producer for whom complete information with respect to none of the calendar years 1933, 1934, or the year ending September 30, 1935, is submitted to the Market Administrator, or from whose farm, according to such information, no milk or cream was delivered in bulk to processors in one or more months in each of the calendar years 1933, 1934, and the year ending September 30, 1935, until a satisfactory record of deliveries of milk in twelve consecutive months subsequent to October 1934 becomes available to the Market Administrator, that figure which is 75 percent of the average delivery per day during the consecutive months subsequent to October 1934 and immediately prior to the date hereof, for which a record of milk deliveries is available to the Market Administrator; and, when a satisfactory record of deliveries of milk for twelve consecutive months following October 1934 becomes available to the Market Administrator, that figure which is higher of the two following calculations: 75 percent of the average delivery per day throughout such twelve consecutive months and the average delivery per day during the three consecutive months of such twelve months in which the average delivery per day was lowest.

3. In the case of each producer who did not regularly sell milk for a period of thirty (30) days prior to the effective date hereof to a handler or to persons within the Marketing Area, that figure which is equal to the same percentage of his average delivery per day during the period when he receives the Class II price pursuant to paragraph 4 of section 1 of article VIII as is the relationship between (a) the total deliveries of all producers not in excess of their respective bases during such period and (b) the total deliveries of all producers.

4. In the case of a producer who, as a tenant or landlord, moves his entire herd from one farm to another farm: the higher of the two figures from which have been calculated, pursuant to section 4 of this article, respectively, (a) the base in effect for the farm from which the herd is moved and (b) the base in effect for the farm to which the herd is moved.

Sec. 6. *Bases after March 31, 1937.*—In calculating, pursuant to section 4 of this article, bases to be in effect after March 31, 1937, the Market Administrator shall determine with respect to milk delivered in bulk to handlers from the farm operated by such producer:

1. In the case of bases which are to be in effect during the period from April 1, 1937 to March 31, 1938, that figure which is the higher of (a) the average delivery per day during the three months of the calendar year 1936 in which deliveries of milk were lowest and (b) sixty (60) percent of the average delivery per day throughout the calendar year 1936; and

2. In the cases of bases which are to be in effect for the year beginning April 1, 1938, and for each year thereafter beginning April 1, that figure which is the higher of (a) the average delivery per day during the three months of the next preceding calendar year in which deliveries were lowest and (b) forty (40) percent of the average delivery per day throughout such calendar year.

Sec. 7. *Recommendations.*—Prior to January 1, 1937, the Market Adminstrator shall recommend to the Secretary amendments to this article which will provide for an equitable method of base rating with respect to those producers for whom, due to fortuitous circumstances or otherwise, the provisions of section 6 of this article would result in bases inequitable as compared with the bases of other producers.

Article VIII—Payments for Milk

Section 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period, each handler shall make payments, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

1. To producers, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in paragraphs 1 and 2 of section 4 of this arti-

cle, for that quantity of milk delivered by each producer not in excess of the base of such producer;

2. To any producer, whose farm is located within forty (40) miles of the State House in Boston and who delivers milk to such handler at a plant located within forty (40) miles of the State House in Boston, at $3.30 per hundredweight for that quantity of milk delivered by such producer not in excess of the base of such producer;

3. To producers, at the Class II price, subject to the differential set forth in paragraph 3 of section 4 of this article, for that quantity of milk delivered by each producer in excess of his base;

4. To any producer, who did not regularly sell milk for a period of thirty (30) days prior to the effective date hereof to a handler or to persons within the Marketing Area, at the Class II price, subject to the differential set forth in paragraph 3 of section 4 of this article, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month;

5. To producers, through the Market Adminstrator, by paying to or receiving from the Market Adminstrator, as the case may be, the amount by which the payments made pursuant to paragraphs 1, 2, 3, and 4 of this section are less than, or exceed, the value of milk as required to be com[illegible]ted for such handler pursuant to section 1 of article VII, as shown in a statement rendered by the Market Administrator on or before the 20th day after the end of such delivery period.

Sec. 2. *Errors in Payments.*—Errors in making any of the payments prescribed in this article shall be corrected not later than the date for making payments next following the determination of such errors.

Sec. 3. *Butterfat Differential.*—If any producer has delivered to any handler during any delivery period milk having an average butterfat content other than 3.7 percent, such handler

shall, in making the payments prescribed by paragraphs 1, 2, 3, and 4 of section 1 of this article to such producer, add for each one-tenth of one percent of average butterfat content above 3.7 percent or deduct for each one-tenth of one percent of average butterfat content below 3.7 percent an amount per hundredweight which shall be calculated by the Market Administrator as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, subtract 8 cents and divide the result by 10.

Sec. 4. *Country Station Differentials.*—The payments to be made to producers by handlers pursuant to paragraphs 1, 3, and 4 of section 1 of this article shall be subject to differentials as follows:

1. With respect to that quantity of milk which is not in excess of his base, delivered by a producer to a handler's plant located more than forty (40) miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

2. With respect to the quantity of milk which is not in excess of his base, delivered by a producer, whose farm is located more than forty (40) miles from the State House in Boston, to a handler's plant located not more than forty (40) miles from the State House in Boston, there shall be added 21 cents per hundredweight.

3. With respect to the quantity of milk delivered by a producer, which is in excess of his base, at the plant of a handler located more than forty (40) miles from the State House in Boston, there shall be deducted six (6) cents per hundredweight.

Sec. 5. *Other Differentials.*—In making the payments to producers set forth in paragraphs 1, 2, 3, and 4 of section

1 of this article, handlers may make deductions as follows:

1. With respect to all milk delivered by producers to the plant of a handler which is located more than forty (40) miles from the State House in Boston and which is located more than two (2) miles from a railroad shipping point, an amount not greater than 10 cents per hundredweight; provided, that such deduction has been approved and made public by the Market Administrator prior to the time of payment.

2. With respect to milk delivered by producers to a handler's plant which is located more than fourteen (14) miles, but not more than forty (40) miles, from the State House in Boston, an amount equal to 10 cents per hundredweight of Class I milk actually sold or distributed in the Marketing Area from such plant, such total amount to be deducted pro rata on all that milk not in excess of the respective bases of such producers.

Portions of Hearings held December 10-12, 1935

TESTIMONY OF PAUL MILLER
DAIRY SECTION, AAA

* * *

[18] In the Boston market (the Greater Boston marketing area) widely varying systems of pro-rating to producers the proceeds of sales to handlers have prevailed. Some associations pay [19] producers a composite price for all milk, several pro-rate to producers the proceeds of sales to handlers on a base-rating plan, but the method of establishing bases varies between associations. This situation has caused a highly unsatisfactory relationship between producers and associations of producers. A plan that will place all producers on a comparable basis is highly desirable. The plan that is incorporated in the proposed marketing agreement and proposed order has the great advantage that it purports to place all producers under a uniform plan. Also, the large number of options from which the producer may select his base is sufficient to assure

that each producer will be in a position to select the base that will be to his advantage in view of his type of farm organization and operation. On the other hand, this plan will, for the time being, result in total bases being considerably in excess of total fluid milk sales in the market. Thus, total bases will be so large that they will be equivalent to fluid milk sales during the season of short production, as should be the case. However, it is necessary to follow this procedure at first in order to place all producers on a comparable basis. The other features of the plan involve the readjustment of bases in time so that total bases will be brought more in line with fluid milk sales. Stated differently, the market will progress steadily from one that is operating on what in some months will be approximately [20] a composite price basis to one that is operating under a sound base-rating plan of pro-rating to producers the proceeds of sales to handlers.

* * *

[131-132] MR. MILLER: I will attempt to make just a brief statement that may clear up the general features of the plan, by reading the statement in the proposed agreement. Just let me make a statement about the proposed plan of rating. It provides six options for determining the base of a particular producer. With respect to 1933, 1934 or 1935, the base is determined by taking either 75 per cent of the average, yearly production for any one of those three years, whichever is highest, or by taking the average daily production for the low quarter of any one of those years, whichever is highest. I don't suppose that is very clear; shall I explain it further? That is, the production for the first year, and then the idea is to bring it gradually on a more uniform basis by reducing the options in the second year. That is, from April 1, 1937, to March 31, 1938, the proposal is that the base shall be that figure, which is higher of the following two calculations with respect to the deliveries of milk in bulk to handlers from the farm of such producer; (a) the average delivery of milk per day during the three calendar months of the calendar year 1936 in which deliveries of milk were lowest; and (b) 60 per cent of the average delivery of milk per day throughout the calendar year 1936.

[133] You see there are still two options but each is based upon the production of the calendar year 1936. Then in the following year another step is taken that brings the rating of every farmer onto a more uniform basis. You see, as long as there are several options, the rating is not very uniform.

So, the final step is as follows:

For the year beginning April 1, 1938, and for each year thereafter beginning April 1, that figure which is higher of the two following calculations with respect to the deliveries of milk in bulk to handlers from the farm of such producer; (a) the average delivery of milk per day during the three months of the next preceding calendar year in which deliveries were lowest; and (b) 40 per cent of the average delivery of milk per day throughout the next preceding calendar year.

Our estimations are that either of those options in determining the base, amounts to more or less the same thing. So that the production for the final year brings the determination of the base, in general, onto a quite uniform procedure.

You see, the idea of the whole thing is to work out and finally get on to a uniform rating plan that applies generally throughout the milk shed. As I stated this morning, in presenting our brief, at the present time many different systems obtain. There are rating plans in effect under which farmers are paid, and many farmers in other groups, at the [134] present time, receive payment for milk on what is called a composite price basis, that is, no rating. It is true that there is a rating plan in the market by which the proceeds are allotted among different groups, but each of these groups takes proceeds allotted to it by the farmer plan, and distributes it in its own way, and the result is that it is very difficult for your farmers to determine whether you, as an individual and a member of one group, are paid equitably in comparison with some other farmer as a member of some other group, because your bases of payments are somewhat, and often very different.

So it seems as if, as we proceed in our efforts to work out a general marketing scheme in the market, we should give a lot of attention to some plan that will at least gradually bring

this procedure of dividing up the Class 1 market among producers on a uniform plan.

Now perhaps I should explain, as well as I can, the situation as provided in the proposed agreement with respect to the so-called Massachusetts contingent of the milk shed. Under the proposed plan, Massachusetts producers receive their bases and determine their bases in exactly the same manner as other producers throughout the shed, that is, the procedure, each one of these years, apprise the same to them as to the producers in Vermont and the other states. The only difference is this, as has been pointed out, and which is quite [135] material, that not the Massachusetts producers only, but all producers within the 40 miles of the State House at Boston, receive for base milk, not the blended price, but what amounts to the Class 1 price. While they earn their basis and determine their basis in the same way, base milk is priced differently as far as they are concerned to all producers located in that zone.

Now, I presume that you know some reason for that special provision located in that zone. I am not sure that I made such a statement of that as we here in this brief, and so I think I might make it at this time, and then perhaps there will be further questions.

With respect to this particular provision, it should be noted that a producer whose farm is located near the market is in a position to supply Class 1 milk for use at all times, at less cost and distances, and if necessary he can, after each twice-a-day milking, put his milk on his own truck and deliver it to a handler or to consumers. Forty miles, however, is approximately a limit of the use of such facility in handling milk.

In addition, the area for supplying milk to the Boston area shows a rather definite gap between farms located within 40 miles of the State House and those which deliver milk to plants located in the 41-60 mile zone.

Producers beyond the 40-mile line may, if desired, deliver [136] milk to the farmers within the 40-mile line, in which event they are to be paid the 40 cents plus the 26 cents, as discussed in the differential in Section 4.

Now, does that clear up a little bit this provision?

MR. C. F. WHITE: One statement that you made, "nearby producers can better deliver to the market than those far away". I would like to ask this question: Do they do it?

MR. MILLER: I don't believe I am very well prepared to answer that question.

MR. WHITE: Then, why give that as a reason?

MR. MILLER: I suppose that they must be in a position to do so, and undoubtedly do so.

MR. WHITE: Isn't it true that the real reason—we might as well bring it out here—that these farmers in the 40-mile zone are given preference, is so as to get the Massachusetts Board to work with you?

MR MILLER: No, sir; no, sir; I do not think we need to bring that in. It is not that consideration. It is for the purpose of getting the Massachusetts producers and other nearby producers to work, not with us, necessarily, but with you. The problem is to find some kind of scheme that you can all accept and work out together. And we have heard a good deal from the nearby producers in regard to their position. I think that our first very tentative proposal did not provide anything of this sort, and it seemed to be so different [137] from the scheme or situation that now exists, that I think that one thing that is perhaps being overlooked is this fact, that as you work onto this basing plan, this particular price charge perhaps would disappear. As the plan works out, base milk presumably will be brought into better adjustment to sales. The only reason now why base milk does not bring Class 1 prices is that there is so much base milk, that much of it has to be sold as Class 2.

MR. WALKER: My question had to do with the present proposed rating. It was a matter of information. Doesn't this proposed base rating increase the rated milk rather than decrease it?

MR. MILLER: Yes, sir, for the first year, it does, so much so that we state in the brief that the price, notwithstanding the rated plan, amounts to, in some months, practically a composite price, and the reason for it is that it seems to be desirable and necessary to give farmers who have worked under a

base rating plan or who have done so for only a short period, a chance to get onto such a plan. It has been argued that if we adopt a plan similar to the plan that it is contemplated that this will develop into at the end of the third year, if we started off with that, many farmers would undoubtedly complain that they have not had an opportunity to adjust their production in such a way as to maximize their base to the percentage of their milk that * * *

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TESTIMONY OF W. A. BRONSON
NEW ENGLAND MILK PRODUCERS ASSOC.

[65] RELATION OF ESTABLISHED DELIVERY BASES TO FLUID MILK AND CREAM SALES.

The delivery bases established under this provision would be of sufficient volume to take care of the fluid milk requirements of the market and in addition the fluid cream requirements. It also would take care of the peak requirements for fluid milk which come during certain seasons of the year.

MR. BLANDI: Approximately how many producers do you represent, Mr Bronson?

MR. BRONSON: I think the information available in the Milk Market Adminstrator's office will show that, of the volume of milk that is being handled in the Boston pool, the New England Dairies runs from 70 to 75 per cent of the milk.

MR. BLANDI: And in producers actually how many?

MR. BRONSON: In the Boston pool, as such, probably upward of 12,000 producers.

MR. BLANDI: How long have you held your present position?

MR. BRONSON: I have been with the New England Milk Producers Association, as statistician, since 1920.

MR BLANDI: In your experience, would you say that the base-rating plan, as we have designed it in this proposed marketing agreement and order, tends to curtail production [66] in any way?

MR. BRONSON: No, sir; in fact, the figures show that production under the base-rating plan operated this past year, production was considerably ahead of the three previous years, by a considerable volume.

MR. BLANDI: Then, as far as you know, there is nothing in the proposed agreement and order that would tend to dictate to the producer what he shall or shall not produce?

MR. BRONSON: No, sir.

MR. BLANDI: That is all.

MR. LeBLANC: Mr. Chairman, may I ask a question?

PRESIDING OFFICER MATHER: Yes.

MR. LeBLANC: Mr. Bronson, can you tell us what is the real cost of production for 100 pounds of milk, now?

MR. BRONSON: I think the cost is very much greater than the price being received for the milk. As to each individual cost, it varies with each individual producer. I know that the cost of production for milk in our New England territory is considerably higher than the price received.

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120 **Testimony of Howard Selby, Mgr. United Farmers Creamery**

There is a particular feature about this proposed marketing agreement that I want to call attention to. It has not been mentioned here today, in spite of the fact that the agreement apparently has been thoroughly covered, and that relates to the Massachusetts situation. If I
121 interpret this agreement correctly, and my Board of Directors has studied it, and they understand it, it means that the producers located in the Greater Boston area having a radius of 40 miles around, will be exempt from the necessity of equalizing their production. They will be given the base rating on the 75 per cent plan in accordance with the rest of us, but they will receive for their base volume of Class 1 milk, an undiluted and unblended price.

I find so many men who have been engaged in the industry for a long time who do not seem to take into account just what that means. We spoke of the price of Class 1 milk being advanced 23 cents, today, but we do not understand that that may mean only 5 or 7 or 8 cents a hundredweight in the total production. It is proposed in this agreement, as it is now drawn, that the Massachusetts farmer shall not suffer any blended price. The blended price means on the basis of only about 42 per cent of all the excess milk being settled for on a surplus basis.

I figured yesterday that if United Farmers was to enjoy that same opportunity and protection, it would result in a sum of $160,000.00 for 1935 or close to $100.00 per farmer, which would be an attractive net profit for each particular man to enjoy that privilege. It is often brought out in testimony and statements that the Massachusetts farmer should be protected in such manner because
122 of the increased cost of production near to the City of Boston. If that is the case, then, let us produce the milk in northern Vermont and ship it into Boston at the lower cost that we are capable of producing the product in this area. There is relief given to the producers in Massachusetts where they do not pay a station charge.

So, all in all, there is a substantial benefit accruing to them. If the price of milk advanced 35 cents a hundredweight on Class 1, we know their price would advance to the extent of 75 per cent of their production, that is, to these men, meaning that they would get 27 cents a hundredweight more for their composite milk as compared with this 9 to 12 cents that we would get in this section of Vermont, or operating in other parts of the milk shed.

The contention is made that that is such a small factor in Massachusetts that we can afford to wink at it.

I would state here that Massachusetts production has been only 9.2 per cent of the milk in the Boston market, and yet one or two years ago Massachusetts was producing

about 8 per cent of the milk in the Boston market, and today it is producing approximately 14 per cent. Perhaps that 14 per cent is overstated, but at any rate we know there has been a substantial increase. We know that the farmers in Vermont have established a basis and have sold some of their surplus cattle which they own, to the
123 Massachusetts farmers, with the result that the Massachusetts farmer, if located near to Boston, turns that milk into the market in competition with you, and gets the benefit of Class 1 prices, under this plan, and crowds the rate with just so much surplus milk into your blended price, and gives you just so much less returns than promised under the license plan. It may be said that that is provided for, in that that exists only one year and, after that, it will go to a basis of 60 per cent, and then 40 per cent. But we have no guarantees that there will be no further revisions of this agreement, but we do have the assurance that if that added charge comes to the producers in that area, it is most reasonable to suppose that they will go in for further interest in their production, and if we should come to the end of the marketing agreement after 12 or 18 months, there would be just that much more to contend with at that time.

We feel that no plan should give any preference to any one section over another.

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TESTIMONY OF ERNEST A. BANCROFT
PRESIDENT, NEW ENGLAND DAIRIES

[282] As to the matter of nearby producers, that is another difficult problem, and we have to be broadminded when we look at it because we, in northern New England, know our own problems and those, near the market, know their own problems, and perhaps we do not get each other's viewpoint, but as I look at it under this proposed marketing agreement the producer that is within a radius of 40 miles of the State House is given, perhaps you might consider it, a preferred position. But

I think he has got a preferred position, anyway you wish to look at it, and you cannot take it away from him, because you do not have to transport the milk to the State House. You are in a thickly populated area, anyway, around there, and he can sell it to the dealer or become a dealer himself, and go direct to the producer, and you cannot stop him. That is something that the location gives to him. I imagine that if most of you men were in that position, you would say that you had a preferred position, and were going to keep it.

There are two things that you can do; one is to concede that he has a preferred position, and, second, get together with him and let him have that position so that you can have a marketing agreement, or else, fight it out with him. If you go right down with the price of milk, and stay there long enough, you would probably eliminate the nearby producers *** [283] many casualties in doing it. That is a price you cannot afford to pay and the only thing to do, then, is to agree that he is probably right, too; if you will take what he is ready to give you, that is the only way you can get the price that I know you mean all want and have all got to have if you will have any degree of prosperity or maintain a decent standard of living.

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TESTIMONY OF G. D. BAILEY
PRODUCER & DIRECTOR BETHEL CREAMERY

[179] Another thing that interested me, that I heard yesterday, is that in regard to the Massachuetts producer in the 40-mile zone. I have not been able to learn from anyone that those producers in the 40-mile zone are going to produce milk enough within that limit. That does not worry me half as much as the producers in Vermont not coming along with us. These men who are down near the market—you perhaps can not say it is their market any more than ours, because they can not produce enough. However, if we antagonize them enough to keep this thing up, it is possible for them to get

legislation through in their state to cause a lot of harm to the Vermont producers. That 40-mile zone—I think, if anybody is familiar with the conditions, there, there is a limit to what they are able to produce in that territory, and it will not become attractive enough for any man to go into it very extensively.

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TESTIMONY OF WILLIAM C. WALKER
FARMER AND ATTORNEY,
CABOT FARM CO-OP.

[207] Now, the next subject that I want to speak of is the matter which I brought up yesterday of the subsidizing of the Massachusetts farmer. I know, when I speak of that, I am perhaps running on kind of thin ice, and perhaps I should not say anything about it, but I believe that you gentlemen should know just how we farmers up here feel about it, and then you can act as you deem fit.

In the first place, I do not believe they have a prior right to that market, for Massachusetts, or any other. Certainly if I established a shoe business here in [208] St. Johnsbury, I would be laughed at if I told the people of St. Johnsbury that they must buy all their shoes from me or pay me a better price than for some shoe that came from Lynn, Masschusetts.

It was stated yesterday by one of the gentlemen, I believe it was one of the gentlemen here at the table, that one reason why they expected that they ought to have a better place than we farmers up country, was the fact that they could deliver their milk more promptly, and have it in better shape, and I asked the question whether it was done. I did that for this reason, and I want you gentlemen to pay close attention to what was done by one dealer down there. Now I won't say that this was a common practice but, in this case, there was a dealer within the 40-mile zone of Boston who had about 80 cans of local milk. This local milk, he took into his plant, separated it, had cream at a very low price and sold his skim milk which cost him nothing, which gave him a profit of

about $50 a day. This milk, you understand, he sold as No. 2 milk and received back from the pool the difference between the No. 2 price and the No. 1 price that he paid the farmers for it. The money that came from this pool, or into this pool, was taken from the farmers up country, given to that dealer within the 40-mile zone to pay his farmers for milk that he sold for No. 2 milk.

* * *

[210] MR. WALKER: Well, he should enjoy the difference in the freight, but when the milk is there, how can he get a better price than we can, here?

MR. BLANDI: It does not cost him as much to get his milk there.

MR. WALKER: What we are kicking about is paying him more for his milk than we are going to get.

A VOICE IN THE AUDIENCE: How much more?

MR. BLANDI: Off the record.

(A discussion followed, off the record.)

MR. TATOR: Without interrupting your talk, may I say that, so far as Bill Walker and I are concerned, he and I have never had an argument, because Bill always shoots straight. My purpose in asking him one or two questions is not to question his honesty; I have always found him absolutely 100 per cent straight.

On this matter, we have to confess to you that there is no one who has any accurate figure computed on just how much more those Massachusetts producers should receive for their milk. I do know that, by being close to the market, they have been able to sell their milk on a flat price and [211] our best estimate is that, for eighty or ninety per cent of their milk, they have received a flat price that is better than you could expect a shipper in Vermont to get. Lots of small dealers want to be paid that way. You cannot educate them to change over. We are instituting an investigation into how much more, over a period of a year, those fellows have been able to get by being right on their doorstep.

Whether you believe it or not, there is a factor of that kind operating in this section, and you cannot go against it with-

out having the entire absorption from that end. Whether this license, as drawn, gives them too much money, is disturbing me, just as much as you. The only thing I can say is that if it is found that it has cost them more than it should have, there is no reason why it cannot be changed. It is different from what they have demanded. They have demanded, through their representative, that every drop of milk they make should be paid for at the Class 1 price.

We do not recognize state lines, but if we were to take the position presented to us, the Massachusetts position, that you are really a tariff problem, we would set up a tariff barrier and say that you cannot sell us lemons from Italy, or some other place.

Now, these people want a better price down there. [212] The Government has not recognized that. Whether these men who put in this license have put in too high a price, I do not know, but I can assure you men that we will find out what the facts are and attempt to see that it is right.

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TESTIMONY OF MR. SHEPARD
FEDERATED DAIRY ASSOCIATION

[357] MR. SHEPHARD: I want to place this organization on record as favoring the establishing of the marketing agreement in this Boston area, and wish to support in particular the increase of price of 35 cents per hundred pounds which has been asked for as an amendment to this license. I believe that this is absolutely necessary for the dairy farmers of New England to carry on and continue to pay their bills. I believe that even with this addition we will not have reached that parity which was supposed to have been brought about under the Act.

I will say that this Association is in favor of the base rating plan. Also, we are in favor of the equalization plan.

I will say in support of the feature which gives preference to the Massachusetts producers within this 40-mile zone, that

it is absolutely necessary and essential that they shall have this preference, not only for the reasons which have been stated, that they have always had a certain preference in this market, but values of feed stuffs, etc., all point to the fact there is a higher cost of production within this nearby metropolitan area in the 40-mile district than there is some distance out.

* * *

[362] MR. THOMPSON: Then if, as a legal necessity, in order to prevent discrimination by this action in this market in imposing an order your milk must come in without preference, you are opposed to it, are you?

MR. SHEPARD: Yes, and I might add that I believe it is my own opinion that the Federal Government cannot enforce regulations or impose regulations upon those Massachusetts producers, but it is also my opinion that in fairness to these producers out of the State, that the Massachusetts producers must be * * *

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ECONOMIC BRIEF WITH RESPECT TO THE PROPOSED MARKETING AGREEMENT AND PROPOSED ORDER FOR THE GREATER BOSTON MARKETING AREA

by

P. L. Miller,
Principal Agricultural Economist,
Dairy Section

and

O. M. Reed,
Senior Agricultural Economist,
Dairy Section.

Paper No. 1, Series on Marketing Agreements and Orders, Dairy Section, Agricultural Adjustment Administration, United States Department of Agriculture. December 2, 1935.

Economic Brief of Department of Agriculture, Dated December 2, 1935

Paragraph 1, therefore, provides that each producer shall be paid, for milk delivered not in excess of his base, the blended price subject to differentials on account of transportation and butterfat, except that those producers whose farms are located within 40 miles of the State House in Boston are to be paid the Class I price for their bases, as set forth in paragraph 2. Paragraph 3 prescribes that each producer shall be paid the Class II price for that milk delivered by him, which is in excess of his base. These three paragraphs combine three adjustments to a uniform price, which are authorized to be incorporated in an order: namely, adjustments on account of production over a representative period of time and an adjustment on account of the location of the farm of the producer. A literally uniform price would be a straight blend of the entire classification value of the milk delivered by all producers to handlers. By means of the computations already discussed and the payment of the Class II price for excess milk, producers thus receive an amount over such a uniform price for that milk represented by their bases and an amount less than such a uniform price for the milk delivered in excess of base, plus the difference between such a uniform price and the Class I price in the case of farms located within forty miles of the State House in Boston. It should be noted that a producer whose farm is located near the market is in position to supply milk for Class I use to the market more easily at all times than those at a greater distance.

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Portions of Order for Greater Boston Marketing Area, issued July 30, 1937 (2 Fed.Reg. 1588)

Order of the Secretary of Agriculture Issued Pursuant to the Agricultural Marketing Agreement Act of 1937. Approved June 3, 1937 (Public 137, 75th Congress) Amending Order No. 4 Regulating the Handling in Interstate or Foreign Commerce, and Such Handling as Directly Burdens, Obstructs, or Affects Interstate or Foreign Commerce, of Milk in the Greater Boston, Massachusetts, Marketing Area

Whereas pursuant to Public No. 10, 73d Congress, as amended, the Secretary of Agriculture, hereinafter called the Secretary, on January 18, 1936, tentatively approved a marketing agreement regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area; and

Whereas, on February 7, 1936, the Secretary issued Order No. 4 regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area, said order being effective 12:01 a.m. eastern standard time, February 9, 1936, and

Whereas, the Secretary, having reason to believe that an amendment should be made to said tentatively approved marketing agreement and to said order, gave, on the 24th day of June 1937, notice of a hearing to be held on the 30th day of June 1937 at St. Johnsbury, Vermont, on the 1st day of July 1937 at Boston, Massachusetts, and on the 2nd day of July 1937 at Augusta, Maine, on a proposed amendment to said tentatively approved marketing agreement and said order, and at said times and places conducted a public hearing at which all interested parties were afforded an opportunity to be heard on the proposed amendment to said tentatively approved marketing agreement and to said order; and

Whereas, after such hearing and after the approval by the Secretary, in accordance with the powers and functions vested in him by the Agricultural Marketing Agreement Act of 1937, which reenacted and further amended Public No. 10, 73rd Congress, as amended, said Agricultural Marketing Agreement Act

being hereinafter referred to as the act on the 10th day of July 1937, of an amendment to said tentatively approved marketing agreement, handlers of more than 50 per centum of the volume of milk covered by such order, as amended, which is marketed within the Greater Boston, Massachusetts, Marketing Area, refused or failed to sign such tentatively approved marketing agreement, as amended, relating to milk; and

Whereas, the Secretary determined on the 27th day of July 1937, said determination being approved by the President of the United States on the 27th day of July 1937, that said refusal or failure tends to prevent the effectuation of the declared policy of said act, and that the issuance of this amendment to said order is the only practical means, pursuant to such policy, of advancing the interests of producers of milk in said area, and is approved or favored by over 70 per centum of the producers who, during the month of May 1937, said month being determined by the Secretary to be a representative period, have been engaged in the production of milk for sale in the Greater Boston, Massachusetts, Marketing Area, and who voted in a referendum conducted by the Secretary of Agriculture on July 17, 1937; and

Whereas, the Secretary finds upon the evidence introduced at the hearing upon such proposed amendment, said findings being in addition to the findings made upon the evidence introduced at the hearing on said order, said original findings being herewith ratified and affirmed by the Secretary save only as such findings are in conflict with the findings hereinafter set forth:

1. That the minimum prices fixed by this amendment are reasonable and justified by the economic data submitted at the aforementioned hearings; that the prices fixed by this amendment will, over a period of time, tend to give milk sold in the marketing area a purchasing power with respect to articles that producers buy equivalent to the purchasing power of such milk in the base period; that the fixing of such prices does not have for its purpose the maintenance of prices to

producers above the levels which were declared in the act to be the policy of Congress to establish; that the method provided for fixing the Class II price is a method which bears a direct and reasonable relationship to the price of cream in the above market;

2. That in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, without the use of a base-rating plan, but with the inclusion of special location differentials, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers;

3. That in view of State laws covering the giving of security by handlers, the giving of security to the Market Administrator for payments to be made by each handler is no longer necessary in order to insure the payment to producers of the minimum prices fixed in the order;

4. That all the remaining provisions of this amendment are necessary to effectuate the other provisions of the order, as amended;

5. That the order, as amended, regulates the handling of milk in the same manner as and is applicable only to handlers specified in the tentatively approved marketing agreement, as amended, upon which hearings have been held; and

6. That the issuance of the amendment to the order and all of the terms and conditions of the order, as amended, will tend to effectuate the declared policy of the act.

Now, therefore, the Secretary of Agriculture, pursuant to the authority vested in him by the Agricultural Marketing Agreement Act of 1937, which reenacted and further amended Public, No. 10, 73rd Congress, as amended, hereby orders that Order No. 4 regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area, issued by the Secretary on February 7, 1936, be and it is hereby amended as follows:

* * *

D. Delete section 1, 2, and 3 of article IV and insert in lieu thereof the following:

Section 1. *Class I Prices to Associations of Producers.*– Each handler shall pay any association of producers for Class I milk, containing 3.7 percent butterfat not less than the following prices.

1. $3.31 per hundredweight for such milk delivered from the plant of such association to such handlers plant located not more than 40 miles from the State House in Boston;

2. $3.26 per hundredweight for such milk delivered from the plant of such association to such handler at a railroad delivery point not more than 40 miles from the State House in Boston; and

3. If such milk is delivered containing butterfat more or less than 3.7 per cent such handler shall add or subtract as the case may be, a differential for each one-tenth of one percent above or below 3.7 percent, which differential is the result of dividing by 330 the cream price used in paragraph 1 of section 3 of this article.

Sec. 2. *Class I Prices to Producers.*–Each handler shall pay producers, in the manner set forth in article VIII, for Class I milk delivered by them, not less than the following prices:

1. $3.19 per hundredweight for such milk delivered from producers' farms to such handler's plant located not more than 40 miles from the State House in Boston.

2. $3.01 per hundredweight for such milk delivered from producers' farms to such handler's plant located more than 40 miles from the State House in Boston, less an amount per hundredweight equal to the freight from the railroad shipping point for such handler's plant to such handler's railroad delivery point in the Marketing Area. Such freight shall be calculated according to applicable rail tariffs for the transportation in carload lots of milk in 40-quart cans and each such can shall be considered to contain 85 pounds of milk;

3. For the purpose of this section the milk which was sold or distributed during each delivery period, by each handler, as

Class I milk shall be presumed to have been that milk which was received at such handler's plant located not more than 40 miles from the State House in Boston (a) directly from producers' farms and (b) from the nearest plants located more than 40 miles from the State House in Boston.

Sec. 3. *Class II Prices.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class II milk not less than the following prices per hundredweight:

1. In the case of such milk delivered to a handler's plant located not more than 40 miles from the State House in Boston, a price which the Market Administrator shall calculate as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, multiply the result by 3.7, and 2.125 times the average of the weekly quotations per pound of domestic 20-30 mesh, caseing in bags delivered in carload lots at New York, as published by the Oil Paint and Drug Reporter during such delivery period, and subtract 42 cents; and

2. In the case of such milk delivered to a handler's plant located more than 40 miles from the State House in Boston, the price calculated by the Market Administrator, pursuant to paragraph 1 of this section, minus 6 cents.

* * *

G. Delete article VII and insert in lieu thereof the following:

Article VII. Determination of Uniform Prices to Producers

Section 1. *Computation of Value of Milk for Each Handler.*—For each delivery period the Market Administrator shall compute, subject to the provisions of article VI, the value of milk sold or used by each handler, which was not purchased from other handlers by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to sections 2, 3 and 4 of article IV and (b) adding together the resulting value of each class.

Sec. 2. *Computation and Announcement of Uniform Prices.*—The Market Administrator shall compute and announce the uniform prices per hundredweight of milk delivered during each delivery period in the following manner:

1. Combine into one total the respective values of milk, computed pursuant to section 1 of this article, for each handler who made the report as required by section 1 of article V for such delivery period and who made the payments required by article VIII for milk received during the delivery period next preceding but one;

2. Add the total net amount of the differentials applicable pursuant to section 4 of article VIII;

3. Subtract the total amount to be paid to producers pursuant to paragraph 2 of section 1 of article VIII;

4. Divide by the total quantity of milk which is included in these computations, except that milk required to be paid for pursuant to paragraph 2 of section 1 of article VIII;

5. Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in paragraph 3 of section 1 of article VIII;

6. Add an amount which will promote, pursuant to section 3 of this article, any cash balance available; and

7. On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, and (c) the Class II price.

Sec. 3. *Proration of Cash Balance.*—For each delivery period the Market Administrator shall prorate, by an appropriate addition pursuant to section 2 of this article, the cash balance, if any, in his hands from payments made by handlers for milk received during the delivery period next preceding but one, to meet obligations arising out of paragraph 3 of section 1 of article VIII.

H. Delete articles VIII and IX and insert in lieu thereof the following:

Article VIII Payments for Milk

Section 1. *Time and Method of Payment.*—On or before the 25th day after the end of each delivery period each handler shall make payment, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

1. To each producer, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in section 4 of this article, for the quantity of milk delivered by such producer.

2. To any producer, who did not regularly sell milk for a period of 30 days prior to the effective date hereof to a handler or to persons within the Marketing Area, at the Class II price, in effect for the plant at which such producer delivered milk, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month;

3. To producers, through the Market Administrator, by paying to or receiving from the Market Administrator, as the case may be, the amount by which the payments made pursuant to paragraphs 1 and 2 of this section are less than or exceed the value of milk as required to be computed for such handler pursuant to section 1 of article VII, as shown in a statement rendered by the Market Administrator on or before the 20th day after the end of such delivery period.

Sec. 2. *Errors in Payment.*—Errors in making any of the payments prescribed in this article shall be corrected not later than the date for making payments next following the determination of such errors.

Sec. 3. *Butterfat Differential.*—If any producer has delivered to any handler during any delivery period milk having an

average butterfat content other than 3.7 percent, such handler shall, in making the payments prescribed by paragraphs 1 and 2 of section 1 of this article to such producer, add for each one-tenth of one percent of average butterfat content above 3.7 percent or deduct for each one-tenth of one percent of average butterfat content below 3.7 percent, an amount per hundredweight which shall be calculated by the Market Administrator as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, subtract .8 cents, and divide the result by 10.

Sec. 4. *Location Differentials.*—The payments to be made to producers by handlers pursuant to paragraph 1 of section 1 of this article shall be subject to differentials as follows:

1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

2. With respect to milk delivered by a producer to a handler's plant located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.

3. With respect to milk delivered by a producer whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

4. With respect to milk delivered by a producer whose whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

Sec. 5. *Other Differentials.*—In making the payments to producers set forth in paragraphs 1 and 2 of section 1 of this article, handlers may make deductions as follows:

1. With respect to all milk delivered by producers to the plant of a handler which is located more than 40 miles from the State House in Boston and which is located more than two miles from a railroad shipping point an amount not greater than 10 cents per hundredweight provided, that such deduction has been approved and made public by the Market Administrator prior to the time of payment.

2. With respect to milk delivered by producers to a handdler's plant which is located more than 14 miles, but not more than 40 miles, from the State House in Boston, an amount equal to 10 cents per hundredweight of Class I milk actually sold or distributed in the Marketing Area from such plant, such total amount to be deducted pro rata on all milk delivered by such producers.

3. With respect to milk delivered by producers to any handler's plant from which the average daily shipment of Class I milk during any delivery period is less than 21,500 pounds, an aggregate amount, prorated among producers delivering milk to such plant equal to the difference between the freight to the marketing area at the carload rate and at the less than carload rate for the Class I milk shipped during such delivery period.

* * *

Portions of the Hearings held June 30, July 1-2, 1937, Docket No. A51, O-51

TESTIMONY OF MR. APLIN FOR THE MARKET ADMINISTRATOR

[128] THE WITNESS: With respect to Three under Article VIII, reading: "With respect to milk delivered by a producer whose farm is located more than forty miles but not more than eighty miles from the State House in Boston, there shall be added eighteen cents per hundredweight." Now, I would like to inquire why we arrived at this 80-mile distance, why it isn't laid out into other districts of about sixty or 100 miles, or just why this particular article describing within a limit of 80 miles from Boston?

[129] MR. APLIN: The question is, why is the provision made that producers on farms less than 80 miles from the State House in Boston and more than 40 miles should receive an additional 18 cents per hundredweight in the price? And, while I am answering that I might as well point out that producers living within 40 miles receive an additional 36 cents instead of 18 cents. Now, the history of the market shows that without any Government regulation producers on farms located within those distances over a period of years have been able to receive that much more for their milk. That is due to the fact that their production is relatively even, and their milk is accessible to small dealers. If we should take away from from those producers a differential that they have been able to get without Government regulation they would have a legitimate objection that we are placing them at a comparative disadvantage as compared with producers more distant from the market.

We hope to have introduced at the hearing in Boston tomorrow evidence of the prices that have been received by these nearby producers in the past as compared with producers 200 miles from the market, and we propose, if necessary, to change the amount of these differentials so as to give nearby producers the same relative position that they have had over a period of years without any regulation.

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[229] MR. APLIN: Part G is on Page 5 of this mimeographed sheet and is a proposed new provision. It is proposed to rewrite Articles 8 and 9, and this is the way it is proposed to write it. This covers the payments for milk to producers. It provides that on or before the 25th day after the end of each delivery period each handler shall make payment as follows: First that he shall pay to each producer, except new producers, the blended price per hundredweight that has been computed subject to the differentials that are set forth later in this same article; that he shall pay to any producers who did not regularly sell milk for a period of 30 days prior to the effective date of the order the Class 2 price for all his milk for the remainder of the month in which he started deliveries and two more full calendar months; and, finally, that he shall pay to producers, through the Market Administrator, by paying to or receiving from the Administrator, as the case may be, the amount by which the payments due his producers are less than or exceeds the value of his milk.

[230] Now, that is the paragraph that provides for payments to and from the equalization pool; if the amount which the dealer is required to pay his producers is less than the value of the milk as it is charged to him under the class prices then he pays the difference to the pool. If the value of the milk due to his producers is greater than the amount charged to him he receives the difference from the pool. Of course those payments from the pool approximately would balance each other.

Now, Section 2 provides that if any errors are made in payments they shall be corrected the next period after the error is discovered.

Section 3 provides for a butterfat differential which is the same as it has been. It is based on the cream market.

Section 4, over on page 6, provides for location differentials. This section, the last two paragraphs particularly in this section are new. Now, the price which is arrived at from the calculation of the pool is a blended price for all milk f.o.b. the market with country station allowances deducted. Now, Paragraph 1 here provides that there shall be deducted from that blended

price in the case of milk delivered to a plant more than 40 miles from the State House an amount equal to the carlot freight rate from that plant to Boston, so that that deduction would be different for each freight zone, and the price would be smaller by the amount of difference in freight from each zone as we go out from the market. Now, Paragraph 2 provides that in the case of milk delivered from a producer to a plant located [231] within forty miles of the State House there should be added 18 cents per hundredweight. That is added for the reason that in the case of country stations there is allowed the dealers on Class I milk 20 cents a hundredweight as a country station charge, and we are allowing for containers in which to ship the milk three cents in the case of milk received at city plants, instead of having a 20 cent and a three cent deduction, which would be 23 cents. There is a receiving station allowance of only five cents. The difference is 18 cents per hundredweight. We add back in here 18 cents to the producer whose milk does not pass through a country station. That would be added to the price to any producer whose milk was delivered to a plant here within 40 miles of the State House, regardless of where the producer's farm is located. That would be added because his milk doesn't go through a country station, therefore, he shouldn't pay any charge for operating country stations. The paragraphs 3 and 4 relate to the differentials added to the price on account of the location of the farmer's farm.

Paragraph 3 there provides that in the case of milk delivered by a producer whose farm is more than 40 miles but not more than 80 miles from the State House in Boston there should be added 18 cents per hundredweight, and paragraph 4 provides that in the case of milk from a producer whose farm is not located more than 40 miles from the State House there should be added 36 cents per hundredweight. Those figures are only tentative. They are based on what information [232] we now have as to the difference in the price received by the nearby handlers over a period of years as compared to prices received by producers at country stations. We expect evidence to be introduced here today to show whether or not

that is the proper differential; that is, whether 36 and 18 cents is a correct amount. The idea is, without regulation over a period of years producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their milk is rather even throughout the year, have been able to obtain a price greater than the country station price, and the difference is more than the difference between the freight and the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. On the other hand, if we gave them more than they had without regulation we would be giving it to them at the expense of other producers. It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that.

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[353]MR. APLIN: Paragraph G starts near the top of Page 5 of the mimeographed sheet. That proposed amendment would rewrite Article VIII, which has to do with the method of paying producers. As amended the order would provide that on or before the 25th day after the end of each delivery period each handler should make payments to producers as follows: To each producer, except new producers, the blended price which has been computed under the previous Article, subject to the differentials which are set forth later in this article. It also provides in paragraph two that any producers who did not regularly sell milk for a period of thirty days prior to the effective date of this order shall receive the Class 2 price for his milk until the end of two more full months.

In paragraph 3 it provides that the dealer shall pay to the producer through the market administrator by paying to or receiving from the market administrator the amount by which the payments to his producers are less than or exceed the value of his milk. That is the paragraph that provides for the dealers making payments to the administration pool or receiving payments from the pool. Any dealer who was required to pay his producers less than the value [354] of the milk ship-

ped to him at the price set up in this Order would pay the difference into the equalization pool, and any distributor who was required to pay his producers more money than the value of his milk would receive the difference from the equalization pool.

Section 2 of this Article provides that any errors in making payments shall be corrected not later than the date for making payments next following the determination of such errors.

Section 3 at the bottom of page 5 provides for the butterfat differential to be added to or deducted from the price to producers whose milk is more than 3.7 or less than 3.7. That butterfat differential proposed is the same as the one which was in effect last year under the Order. It is based on the value of cream in Boston. The butterfat would change from period to period as the value of cream changed.

Section 4 provides for certain location differentials. The first paragraph provides for a differential according to the location of the dealer's plant at which the milk is delivered. It provides that there shall be deducted from the blended price at the market an amount equal to the carlot freight rate to Boston from the zone in which is located the plant where the producer has delivered his milk. That would mean that the blended price would be slightly less in each zone as the distance from the market increased, and the difference in price from one zone to the next would be the difference in the carlot freight rate.

Paragraph 2 provides that in the case of milk delivered [355] from a producer to a dealer's plant not more than 40 miles from the State House in Boston there should be added 18 cents per hundredweight. That is added there because the price which is computed as a blended price is the price with country station allowance deducted; and if milk is delivered by a producer to a plant within 40 miles from Boston there is allowed to be deducted only five cents per hundredweight.

Therefore, the difference of 18 cents is added to the price to producers who deliver their milk directly to the market, and that would apply to any milk delivered to a plant within 40 miles of Boston, regardless of where the producer's farm is located.

Paragraphs 3 and 4 of that Section provide for differentials according to the location of the producer's farm. Paragraph 3 provides that in the case of milk delivered by a producer whose farm is located more than 40 miles but not more than 80 miles from the State House in Boston, there shall be added 18 cents per hundredweight. Paragraph 4 provides that in the case of milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston there shall be added 36 cents per hundredweight. Those two differentials of 18 cents and 36 cents are paid to the producer on account of the location of his farm near the market, and the exact amount of those differentials as set up here is tentative.

We received considerable evidence at Boston yesterday as to the average price which had been received over a period of years by producers near the market as compared with the average price [356] received by producers who delivered to plants 200 miles from the market. The intention was to set up these differentials at such an amount as would allow producers near the market to maintain the same relative position compared with producers distant from the market that they have held over a period of years without any Government regulation. If it is shown, as it has been, that producers whose farms are near the market have received without regulation consistently over a period of ten years or longer a difference in price which cannot be entirely accounted for by the freight rate or the country station allowance, we would be placing those producers in a relatively poorer position as compared with distant producers if we set up a plan which did not give them the same relative price On the other hand, if we should give them a differential so large as to put them in a relatively better position than they had been without Government regulation it would be unsatisfactory because that extra price could be paid to them only at the expense of other producers. So, the intent was to keep them in a relative position and to give them a differential which will enable them to do that.

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TESTIMONY OF W. A. BRONSON
NEW ENGLAND MILK PRODUCERS ASSOCIATION

[266] The proposed pending amendments to Order No. 4, Article VIII, Section 4, paragraph 2, provide for an 18 cents per hundredweight differential on milk which is delivered directly to a city plant, without passing through a country plant. This item is correct since the difference between the direct city price and the country station price is 18 cents per hundredweight, difference $3.19 and $3.01. This difference is accounted for by differences in costs between direct delivered milk to the city plant and delivery to a country plant with additional costs of receiving before shipment to the market and costs of containers for shipment.

Paragraph 4 of this same section calls for an additional location differential of 36 cents per hundredweight for milk from farms located inside the 40 mile zone. This additional differential is justified by nearness to the market and that in the past producers delivering to distributors at the market have received differentials in line with those proposed in this amended order.

Over a four year period of time, 1927 through 1930, producers delivering to Deerfoot Farms averaged to receive $1.16 per hundredweight more for all milk delivered at Southboro than producers averaged in the 191-200 mile zone for all milk.

Over a ten year period of time, 1923 through 1932, producers delivering to the J. B. Prescott Company at Bedford, Mass., averaged to receive $1.04 per hundredweight, than producers averaged for the same period in the 191-200 mile zone for all milk.

267 Now, the differential that is proposed in this order would work out 90 per cent per hundredweight. I would like to file as exhibits four copies each of the price comparisons for Deer Foot Farms with the more distant milk for the years 1927, 1928, 1929, and 1930, and for the J. B. Prescott Company. I have four copies here.

The Presiding Officer: Are they subscribed and sworn to?

Witness Bronson: No, they are not.

The Presiding Officer: Could you put them in that form before they are put in the record?

Witness Bronson: I am presenting here testimony under oath and I would think that the tables that I put in here might meet that situation.

The Presiding Officer: If they are your figures and not someone else's figures.

Witness Bronson: They are my figures.

The Presiding Officer: They will be received as Exhibit No. 2.

(Whereupon, *Exhibit No. 2 was received* in evidence.)

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267 Witness Bronson: Each year. I think the necessity of a Federal order is borne out by the situation this year and last year, as far as nearby producers are concerned:

268 Prices paid for milk to nearby producers inside the 40-mile zone in May last year under the Federal Order averaged 64 cents per hundredweight or nearly a cent and one-half per quart higher than the price received May this year under the Milk Control Board basis of price. A year ago the producers in the 40 mile zone averaged $3.10 per hundredweight for their milk—this year $2.46 per hundredweight, a decrease of 64 cents per hundredweight.

The comparison of milk prices under the Federal Order as compared with prices under the Control Board is still more unfavorable when compared with the prices paid last year and this year for dairy feeds. A year ago grain cost $1.65 per hundredweight, this year $2.50 per hundredweight. Last year 100 lbs. of milk would buy 188 pounds of grain—this year only 102 lbs., a decrease of 86 pounds of grain or 46% in the ability of the milk price to purchase the most important item of expense the dairyman has.

There appears to be no question that based on past history a Federal Order can give these Massachusetts pro-

ducers more money for their milk than a Milk Control Board Order without assistance from the Federal Government, and that even more money can be obtained for these producers under a joint order of both agencies.

TESTIMONY OF MR. CARTEN
PRESIDENT, NEARBY PRODUCERS ASSOCIATION

[280] MR. CARTEN: I am representing the Nearby Milk Producers Association, the membership of which are located within 40 miles of Boston. Our Association voted to favor a license—we voted to favor a Federal license in the market provided that we retained the special place and the preferences that we have had over the past ten years. The reasons for our having a preference have been stated here already, and the fact that we did have a preference has been stated here already. As for the point that it would be discrimination to give us or keep us in the position that we already had, it seems to me that it would be a much greater discrimination to push us out of the place we have had for many years past in the Boston market. If we are pushed out, we can't go back to making cream or raising cows or anything else that the producers back in the country can do. I am specifically interested in paragraph 4. I would like to ask Mr. Aplin just so that [281] I can get this straight how much per hundred pounds advantage that would give the nearby producers over the 191 to 200 mile zone. Mr. Bronson said that the Deer Foot producers got $1.16.

MR. APLIN: 90¢ per cwt.

Mr. Carten: Thanks. Now, we feel that to be protected in our special place in the market requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. In the second place, we must have somewhere near our differential—our consumer differential

over the 200-mile zone, and get that much. Now, the methods of protecting us under the old license, we received the class one price for all our rated milk, but our Association is very much opposed to ratings—Federal ratings, I might say. We had bad experience with Federal ratings. They were not announced in the periods on which the ratings were based, which was unfair among producers and small dealers. Many of them found themselves with half to two-thirds of their milk as surplus. I can cite specific instances where they lost farms as a result of those Federal ratings. We don't want Federal ratings. Under those circumstances, the fairest way would be to pay us on a ten per cent surplus the year around. Under that, pay us the 90 per cent, class one price, 10 per cent surplus price. The proposal of the license to give us 96¢ over the 200-mile zone, 90¢ is way below anything that Mr. Bronson produced and we have figures here from one of our producers from 1920 to 1930 for the price received for milk shipped to Salem, Massachusetts, to the H. P. Hood Company,
282 and they averaged—it is hard to average them exactly, because in all cases the butterfat wasn't given, but it was between—somewhere between $1.20 and $1.30 over the N.E.M.P.A. price in the 191-mile zone. We should have at least a cent a quart over the equalized price to be protected. That would be 46¢ instead of 36¢, wouldn't it, Mr. Aplin?

[282] MR. APLIN: 46¢ is a cent a quart?

MR. CARTEN: I said, if we had that, it would be 45¢ in paragraph 4?

MR. APLIN: Yes, it will be $1 a hundredweight.

MR. CARTEN: $1 a hundredweight is much less than was suggested—that the AAA suggested. They suggested $1.02—over the one cent a quart.

MR. APLIN: That suggestion was made by the Massachusetts federation?

MR. CARTEN: That suggestion was made at the hearing by the A.A.A. representative. We were led to believe that was

what we were supporting when we voted for the license. The trouble with the 1¢ a quart and why we are so insistent on the cent a quart is that, unlike our proposed plan, which we feel is fair, the ten per cent surplus the year around, we are at the mercy of a very low equalized price. We haven't any idea, and no one has been able to tell us, what surplus the market is going to carry. As I remember, in the New England Dairyman about March last, they reported somewhere around 10 thousand jugs of milk; bought 9 thousand jugs, surplus 1 thousand jugs sales. The other up-country cooperatives have also gotten a large surplus. There were also cream producers. I asked the A.A.A. representative at the hearing that I attended if the up-country cream producer would not come in to [283] this market. He said, yes, no one could blame them if they did under equalization. If Mr. Bronson is here or anyone who is familiar with surplus figures in the market, for the benefit of our 40-mile producer, I would like to have some idea of the surplus you expect in this market when you get it. If we get a cent a quart over the equalized price and the equalized price is based on a 70 or 80 per cent surplus, we don't feel that we are getting any protection at all. We would be better off out of it either as producer-dealers or as some other way. And, another trouble with the one cent differential is that it does not protect us against seasonal surplus. Our production is even and in the past all the ten year figures that we have we received practically—nearly as much in the flush period in the spring as we receive in the other part of the year, and a price differential over an equalized price doesn't protect us in the flush season. We make less milk and get less for it. I think that if it was possible at all we asked for a payment on 10 per cent surplus throughout the year. If that is not possible, we will go along with the license, but we must have at least one cent a quart over the equalized price. I am not satisfied with that, and I don't think it will protect it, but I think probably we would go along with it. I don't think any less would be acceptable.

MR. APLIN: In reply to that I would like to say that in that ten-year period, covered by Mr. Bronson's figures, the

average price in the 191 to 200-mile zone was somewhere around $2.50. [284] His figures indicate that the nearby producer got somewhere around a dollar to $1.10 more than that. If he got $1.10 more than the $2.50 price, he would get 44 per cent more. At the present time, we are not on as high a price level as we were then.

You asked about the percentage of surplus in the market. Nobody has any definite figures as far as I know on that. If this order were to go into effect the first of August, as amended, with a composite price, we can only make an estimate as to what the surplus would be in the pool. If it should be 50 per cent, it doesn't seem it should be more than that in August, if there were a 50 per cent surplus and the cream market should not go up any between now and then, the composite price in the 200-mile zone would be about $2.05 a hundredweight and this 90¢ added would make $2.95 and that extra 90 cents would be 44 per cent more than the 200 mile zone price so that you would get the same relative position. You would be getting 44 per cent more than the fellow in the 200-mile zone. That is a lower price level now so that if you got $1.10 more added to the $2.50 then and you get $1.10 more with the $2.05 price now, you would have a bigger advantage than you had then. You would be getting more than 44 per cent more. We would be glad to have those figures that you have.

MR. CARTEN: I have one copy, but it isn't sworn to.

MR. APLIN: (To Presiding Officer) He can put those in as part of his evidence, can't he?

MR. CARTEN: Do you think that from a period from 1920 to 1930 that the prevailing price level—that the differential you are proposing— [285] 36¢ a hundred is the same per cent over—

MR. APLIN: I am just looking here, now, at the figures Mr. Bronson has as to the average price which, apparently, averaged about $2.50 in those years. $1.10 more than that would be 44 per cent more. If this price should come out, $2.05, in the 200-mile zone, now, with a 50 per cent surplus you would then be getting 44 per cent more than they

do up there. The relationship and percentage would be just the same.

MR. CARTEN: I see that, but I still think we ought to have not less than a cent. We have much more expense, much more trouble, down here that has to be compensated some way, and the local producers—there is always a row in the market unless they are compensated in some way.

MR. APLIN: The purpose is to get them the same relative position they had before.

MR. CARTEN: Under a cent over the equalized price we would not be in the same relative position we were before because we would be subject to the spring surplus that we never were before.

TESTIMONY OF MR. SHEPARD FOR FEDERATED DAIRY ASSOCIATION

[294] MR. SHEPHARD: I wish to record the Federated Dairy Association of Massachusetts in favor of the principle of control of the Boston market by joint orders and agreements issued by the Massachusetts Milk Control Board and the Federal Government. This organization since the moment of its incorporation has held fast to this position and has reasserted its belief in the soundness of such a program many times. We believe that as long as there are large supplies of fluid milk either within or without our State available for sale to our Massachusetts markets the price of milk in any part of our State is in jeopardy. We consider this so-called homeless milk not only a threat to our price structure but also it provides an opportunity for unfair distributors to threaten our local producers and cause them to submit to intolerable terms and conditions on penalty of losing their markets.

We have worked with the producers who ship to this Boston market and have prepared facts and figures in cooperation with our State College and Extension Service which show the cost of producing milk in these areas and the history of price differentials as compared to other producing areas. These

studies will be presented by Mr. Branch of our State College, at the request of Boston shippers, and by Mr. MacCollom who is a producer of milk for the Boston market.

We believe that zone prices must be set at fair levels or the dairy farmers in these nearby areas will be compelled to readjust themselves to other modes of marketing or discontinue the production of milk. [295] Their availability to the market makes it possible for them to even become producer distributors, a position enjoyed by many of their neighbors. We have many farmers in Massachusetts who now are delivering their own milk direct to consumers and traveling from 40 to 60 miles daily to do it. All will agree that any definite trend in this direction would increase competition and disrupt our markets. This is a real possibility however, if producers do not receive a fair return and their proportionate share of the consumer's dollar. There are many Massachusetts producers who for years have been on an even production program through the operation of the rating system and their attempt to fill the exact requirements of particular dealers. These same producers regret that apparently ratings are to be abandoned and they feel that it will put them at a disadvantage. We urge you to consider this zone differential problem with great care with all these facts in mind that they may be set at a sound and honest level.

The dairy industry of our State is an important one, and to many of our country towns forms a very substantial percentage of the entire earning power of the community. We have viewed with alarm the number of auction sales of dairy herds during the past few months. We have had too many farmers report the necessity of selling cows to pay grain and tax bills. We already have too many abandoned farms in Massachusetts.

We urge you gentlemen who are members of the Massachusetts Milk Control Board to cooperate with the Federal authorities that the out of State milk over which you have no jurisdiction may be properly controlled. We urge you who are representing the Federal Government, to [296] recognize the fundamental differentials which these nearby areas must have,

in order to exist. We hope that through your combined efforts a stabilized price for milk will be paid to all producers that will enable them to meet their increased cost of production and give them a fair return for their own hard labor.

I wish at this time to give these definite figures—that I might request from Mr. MacCollom, who is a Boston producer and who has worked with committees, set up by our Federation, to study these proposed amendments and who have prepared these figures in cooperation with other producers in this immediate vicinity.

PRESIDING OFFICER BAPKALOW: It would save a good deal of time if they could be filed in a brief.

MR. MacCOLLOM: Yes, it could be filed in the form of a brief.

PRESIDING OFFICER BAPKALOW: Would that be acceptable to you?

MR. SHEPHARD: I wish to say that Mr. MacCollom has spent considerable time in preparing these figures, and I hope that you will give them your most careful consideration. We appreciate that the hour is late and we also have figures on the cost of producing milk in Massachusetts which probably Mr. Branch might file; also in the way of a brief, but it does show definitely and thus proves conclusively the need; and the past history of this nearby area of enjoying a differential on zone price as we prefer to file it.

MR. MATHER: Yes, I think it would be much better to file them in a brief. We can study it at our leisure; it will get the sort of consideration that it should have. I think it would be much better.

[297] MR. SHEPARD: I just want to point out to you just this much more. When this proposed agreement first came to our market we went into these areas where these producers are and we called them in together, and these figures are a result of the men who are actually producers in that area on this problem for the last three or four weeks.

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358 **Testimony of Mr. Greer, Attorney**

Mr. Greer: I have just a word with respect to location differential. I want to say first that I have no quarrel with those producers principally in Massachusetts who feel that they are entitled to some preferential position in this market. I want to direct the hearing authorities' attention particularly to the division which has been made of territory, and suggest that it does not achieve the results desired, nor, I feel, is it a provision which can be
359 enforced as a matter of law. The complaint is that certain producers in Massachusetts, because of a peculiar situation, are entitled to preferential treatment for two reasons; first, because of what they claim is a fixed right in the market, and, second, because of additional cost. It is obvious, of course, that the Federal authority cannot write into this order any provision which by its terms limits a preference to a state line, and it is obvious, also, that the thought is to achieve that result without putting it into words. The provision which has been written in here giving a preference to producers who are either within 40 miles of the State House at Boston or 80 miles does take in other persons than those who saved that preferential right as a fixed right, and which to my mind is of such character that it will not stand analyzation. It is possible—it might be contended not probable, but it is possible that if we should achieve the ideal and Class 1 and Class 2 prices should closely approach one another, that the producers who receive this benefit would be receiving for all their milk a higher price than other farmers are receiving for their Class 1 milk.

Now, as I say, it may be impossible, but there is a possibility under the provision as written—and, if we come to the question of the soundness of this from a legal standpoint we are going to view it not from probability but from possibilities—In the second place, the mere distance from a market sets up no advantage nor disadvantage

which in itself is not compensated for by additional transportation costs. The nearby farmer, so far as mere nearness is concerned, has an advantage because of lower transportation costs. It has been suggested, and it is a valid suggestion, that there may be an additional value to his milk because of the speed with which it reaches the market; there being in the mind of the public at least a psychological feeling that fresher milk is in some way more nutritious than older milk, even though kept under the best refrigerated conditions. That might be a basis for a proper differentiation between producers, but that is not the basis of this differentiation. In this case a man, who, because of his location, was required to take just as much time to get his milk to market as a man in the 200-mile zone, and whose costs are no different in so far as participation in Class 1, would be granted no benefit that was not given to the entire market. Now, I have no quarrel with the position, because a group of farmers may be entitled to some differentiation. I do suggest that an analyzation of this provision would indicate clearly that this provision is not designed to grant a benefit based on that differentiation but is a make-shift device, a stop-gap which will not stand analyzation in the long run.

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TESTIMONY OF MR. SHAUN KELLEY

MR. KELLEY: I represent the Pittsfield market which is entirely an intrastate market yet it has endorsed the Federal license. It is of vital importance to the secondary markets that there shall be a license in the Boston market to insure a stable price in Boston. I also wish to be put on record as President of the Massachusetts Council of the N.E.M.P.A. That council met in June, and unanimously endorsed the Federal license. That council is composed of over some three thousand Massachusetts farmers.

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94 **Economic Brief Prepared by the Department of Agriculture**

A study of the comparison of returns to different types of producers under the proposed plan and those under the rating plan effective in Order No. 4 reveals that the two are perhaps not radically different. In the study, a sample of approximately 15 percent of the producers in the market was taken. These producers were classified as even or uneven. Even producers were defined as all those producers whose deliveries in the quarter of the year in which their daily deliveries were lowest were at least 70 percent of their deliveries in their highest quarter.

It was found that only around one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors. (See table 38.) Only in the nearby zones was there a preponderance of even producers so that, as a group, they showed even deliveries. Nearly two-thirds of the producers located within 40 miles of the market were classified as even. The average of their low-quarter deliveries as a group was over 70 percent of their high-quarter deliveries. Over 50 percent of the producers located between 40 and 80 miles were classified as even, and they, as a group, had an aver-

age of nearly 70 percent. No other zone group had an average of 62 percent. It is proposed that these two groups of producers—that is, those located within 40 miles of Boston and those located between 40 and 80 miles—be given location differentials of $.36 and $.18 per hundredweight, respectively.

Even without consideration of these special differentials the study indicated that even producers under a pool without rating would receive an annual average price of about $.025 per hundredweight higher than the average producer, whereas in a pool with rating—as existed in Order No. 4—the even producers would receive only $.11 per hundredweight higher. The higher price received by even producers under the pool without ratings arises because they deliver relatively less milk in those months when the composite price in the market is low.

It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are preponderantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended.

95 Table 38.—Average percentage deliveries in the low quarter were of deliveries in the high quarter, by zones

Zone	Average distance from market	Average percentage low quarter was of high quarter
	Miles	
1- 4	25.0	70.7
5- 8	56.0	69.2
9-12	111.0	62.1
13-16	140.9	61.4
17-18	169.4	60.6
19-20	191.6	53.7
21-22	215.0	56.1
23-24	231.5	47.7
25-26	246.5	49.3
27-28	268.9	46.9
29-30	290	36.8

Exhibit 2

Comparison of Net Prices Paid for Milk Delivered to a Distributor at the Boston Market (J. B. Prescott Co.) He Purchased Only Local Direct Trucked Milk from the Farm Within 40 Miles of Boston, and the Composite Price Received in the 191-200 Mile Zone Net for All Milk—Both Prices Delivered at the Receiving Station —Per Cwt. 3.7 Milk.

Year	Nearby Delivered	191-200 Mile Zone	Premium Above 101-200 Zone Price
1923	$3.77	$2.62	$1.15
1924	3.32	2.31	1.01
1925	3.56	2.47	1.09
1926	3.57	2.50	1.07
1927	3.75	2.60	1.15
1928	3.88	2.68	1.20
1929	3.89	2.72	1.17
1930	3.45	2.41	1.04
1931	2.54	1.75	.79
1932	2.26	1.53	.73
10-Yr. Average	3.40	2.36	1.04

EXHIBIT 2

Prices Received by Producers Within the 40-Mile Zone for Milk (3.7%) delivered to the Deerfoot Farms Co. at Southboro, Mass. and Prices Received by Producers in the 191-200 Mile Zone

Year	Deerfoot Nearby Price	191-200 Mile Zone Price	Nearby Above 191-200 Mile Zone Price
1927	$3.67	$2.60	$1.07
1928	3.76	2.68	1.09
1929	3.81	2.72	1.09
1930	3.79	2.41	1.38
4-Yr. Average	$3.76	$2.60	$1.16

June 28, 1937

RESOLUTION OF NEARBY MILK PRODUCERS ASSOCIATION

6/28/37

At a meeting of the directors of the Nearby Milk Producers Association, representing producers within forty miles of Boston and shipping approximately 10,000 quarts of milk a day to the Boston market, the following motion was made and carried–

Moved: That we favor a Federal License for the Boston Milk Market, preferably with Class I price for all milk within the forty mile zone–

That if this is not possible that milk within the forty mile zone carry not over 10% surplus.

That if the price in the forty mile zone is not at least one cent over the equalized price we are unalterable opposed to a Federal License.

/s/ Chester E. Barnes
President

NEAR BY MILK PRODUCERS ASSOCIATION

Harold McNiff, Secretary, Groton, Mass.

The directors of the Near By Milk Producers Association favor a Federal License for the Boston Milk Market provided producers within forty miles of Boston retain the preferred position in the market which they have had for many years.

I. We favor a Federal License because we feel:

   A. That such a license, properly administered, can end cut-throat competition and price cutting between cooperatives and dealers and stabilize the the producer price nearer the cost of production than it is at present.

   B. That where milk is taken from producers on a classification plan of payment the records of all cooperatives and dealers should be regularly and carefully audited and individual producers kept informed of the actual state of the market.

II. We favor a Federal License only if our preferred position in the market is protected. This is necessary because of our relatively even production compared with the market as a whole, because our nearness to the market keeps us relatively overinspected by local and state health authorities, because of our high costs of production, and finally because we are all within retailing distance of the market and are potential producer-dealers.

   A. Our production is even thruout the year and has always been adjusted closely to the requirements of our distributors. We must have protection against lower composite prices caused by bulges in production from other areas, particularly during the spring flush season.

B. Our farms are where consumers of milk can easily see them and must be kept in strict accordance with all the rules of local and state health authorities whose officers are frequent visitors.

C. Our taxes, labor, feed costs, and overhead in general are the highest in the market.

D. If a composite price lowers our returns materially below the retail price of milk most of us are in a position to retail milk with the added confusion to the market caused by a large number of small distributors trying to squeeze into Class I sales, or we might be tempted to sell to local dealers not complying with the License.

III. Our price for rated milk has averaged about $1.30 per cwt. for 3.7 milk over the price in the 200 mile zone for the period 1920 to 1930. Rated milk up to 1930 meant practically all milk for local producers because it was always possible to adjust production to secure any rating desired. A list of prices received by one of our members from 1920 to 1930 is attached. This $1.30 is the differential we should receive, plus protection against seasonal surpluses.

A. Class I price for all our milk was considered fair under the last License. However, it was then applied to rated milk and we are opposed to ratings under a License. Rating plans devised in the past by Federal Administrators worked great unfairness on local producers.

1. Many local producers who had increased and decreased their production at the request of small dealers were rated under former Licenses so that one half to two thirds of the daily deliveries which their dealers had asked them to make were classed as surplus milk. Specific instances can be given of local producers not previously on a rating plan who lost their farms thru the imposition of Federal ratings.

2. Federal rating plans were not announced in advance of the periods on which ratings were

to be based so that it was impossible for a producer to adjust his production to secure a fair rating. Under the last Federal Order, for example, it was announced in 1935 that April, May, and June production would not affect 1936 ratings, and in 1936 at least one producer was given a rating based on his production for April, May, and June 1935.

B. As we are strongly opposed to ratings under the License we feel that it would be fair to us to pay Class I price for 90% of the forty mile milk the year around, leaving us to carry a 10% surplus. This would protect us against a low composite price caused by seasonal overproduction outside the forty mile zone and would work no hardship on the rest of the market owing to the relatively small amount of milk involved.

C. The proposal to pay the forty mile producers one cent over the equalized price will not protect us against the effect of seasonal surpluses on prices and we respectfully ask that we be paid as in paragraph B, above. That is, on the basis of ten per cent surplus thru the year. If this is not possible we will go along with the License if we get at least one cent a quart over the equalized price for milk at Boston, altho this gives less than our ten year average differential over the 200 mile zone and not enough protection to our even producers. The directors have voted unanimously that if we do not receive at least one cent over the equalized price we shall oppose the License with every means in our power.

IV. Enforcement. We support the Federal License on the understanding that it will be promptly and effectively enforced on all cooperatives and dealers except producer dealers. We urge that dealers who distribute milk produced on their own farms be exempted from the License as to all milk they produce themselves. As we believe that a License cannot be effectively enforced without

the cooperation of both the Federal and State authorities we feel that no License should be adopted that does not meet the approval of the Massachusetts Milk Control Board.

NEAR BY MILK PRODUCERS ASSOCIATION.

/s/ Chester E. Barnes
President

Prices received by the Crystal Lake Farm, West Peabody, Mass. for milk delivered to H. P. Hood and Sons, Salem, Mass.

		Price paid at Salem, Mass.	Price paid to NEMPA producers at Leicester Junction, Vt.
February	1920—	4.309 per 40 qt. jug.	3.57 per cwt. : test 3.7
March	1920—	4.209 " " " "	3.61
April	1920—	4.209 " " " "	3.44
May	1920—	3.909 " " " "	3.10
June	1920—	3.909 " " " "	2.94
July	1920—	4.109 " " " "	3.24
August	1920—	4.309 " " " "	3.55
September	1920—	4.509 " " " "	3.54
October	1920—	4.509 " " " "	3.56
November	1920—	4.509 " " " "	3.53
December	1920—	4.509 " " " "	3.43
January	1921—	4.776 cwt. — test $	3.01
February	1921—	4.591 " 3.8	2.63
March	1921—	4.196 " 3.7	2.41
February	1921—	4.591 " 3.8	2.63
April	1921—	4.196 " 3.7	2.29
May	1921—	4.079 " 3.68	1.92
June	1921—	4.079 " 3.6	1.93
July	1921—	4.079 " 3.37	2.35
August	1921—	4.044 " 3.6	2.70
September	1921—	4.544 " 3.67	2.82
October	1921—	4.544 " 3.52	2.80
November	1921—	4.544 " †	2.83

Prices above include Grade A premium. Prices below do not.

March	1922—	2.75 test $	2.07
April	1922—	2.9356 " †	1.91
May	1922—	2.908 " †	1.86
June	1922—	2.870 " †	1.85
July	1922—	3.2422 " †	2.15
August	1922—	3.3574 " †	2.27
September	1922—	3.361 " 3.38	2.39
October	1922—	3.948 " †	2.68
November	1922—	3.998 " †	2.84
December	1922—	3.921 " 3.65	2.85
January	1924—	3.864 cwt. — test 3.55	2.85 test 3.7 : per cwt.
March	1924—	3.062 " 3.8	2.10
April	1924—	2.88 " 3.95	1.79
May	1924—	2.88 " 3.95	1.77
June	1924—	2.987 " 4.20	1.81
July	1924—	3.437 " 4.15	2.13
August	1924—	3.537 " 5.85	2.33
September	1924—	4.158 " 4.3	2.57
September	1924—	3.945 " 3.7	2.57
October	1924—	4.108 " 4.2	2.57
October	1924—	4.098 " 4.1	2.57
November	1924—	4.105 " 4.1	2.67
November	1924—	4.086 " †	2.67
December	1924—	4.081 " 4.05	2.67
December	1924—	4.064 " 4.00	2.67

Prices received by the Crystal Lake Farm, West Peabody, Mass. for milk delivered to H. P. Hood and Sons, Salem, Mass.

		Price paid at Salem, Mass.		Price paid to NEMPA producers at Leicester Junction, Vt.
January	1925—	4.069	" 4.1	2.58
January	1925—	4.08	" 4.1	2.58
February	1925—	4.008	" 3.9	2.53
February	1925—	4.009	" 3.9	2.53
March	1925—	3.443	" 3.7	2.33
March	1925—	3.653	" 4.1	2.33
April	1925—	3.597	" 4.0	2.27
May	1925—	3,325	" 3.9	2.05
May	1925—	3.281	" 3.8	2.05
January	1927—	3.656	" 3.75	2.55
January	1927—	3.702	" 3.85	2.55
February	1927—	3.650	" 3.8	2.61
February	1927—	3.546	" 3.6	2.61
March	1927—	3.618	" 3.75	2.58
March	1927—	3.744	" 4.00	2.58
April	1927—	3.618	" 3.75	2.52
April	1927—	3.743	" 4.00	2.52
May	1927—	3.503	" 3.5	2.26
May	1927—	3.462	" 3.4	2.26
June	1927—	3.635	" 3.8	2.14
June	1927—	3.635	" 3.8	2.14
July	1927—	3.535	" 3.5	2.29
July	1927—	3.795	" 3.6	2.29
August	1927—	4.016	" 3.6	2.55
August	1927—	4.186	" 4.00	2.55
September	1927—	4.218	" 3.75	2.79
September	1927—	4.310	" 3.8	2.79
October	1927—	4.290	" 3.9	2.87
October	1927—	4.105	" 3.6	2.87
November	1927—	4.009	" 3.6	3.01
November	1927—	4.374	" 4.1	3.01
December	1927—	4.418	" 4.1	3.08
December	1927—	4.475	" 4.6	3.00
January	1928—	4.089 cwt. — test	3.6	2.91 test 3.7
January	1928—	4.051	" 3.5	2.91
March	1928—	4.001	" 3.6	2.75
March	1928—	4.050	" 3.7	2.75
April	1928—	3.707	" 3.8	2.36
April	1928—	3.613	" 3.6	2.36
May	1928—	3.612	" 3.7	2.24
May	1928—	3.641	" 3.8	2.24
June	1928—	3.778	" 4.1	2.15
June	1928—	3.729	" 4.0	2.15
July	1928—	3.640	" 3.8	2.46
July	1928—	4.040	" 3.7	2.46
August	1928—	3.909	" 3.4	2.77
August	1928—	4.092	" 3.8	2.77
September	1928—	4.112	" 3.8	2.73
October	1928—	4.101	" 3.8	2.84
November	1928—	4.105	" 3.8	3.12
November	1928—	4.155	" 3.9	3.12
December	1928—	4.055	" 3.7	3.02
December	1928—	4.051	" 3.7	3.02

Prices received by the Crystal Lake Farm, West Peabody, Mass. for milk delivered to H. P. Hood and Sons, Salem, Mass.

		Price paid at Salem, Mass.		Price paid to NEMPA producers at Leicester Junction, Vt.
January	1930—	3.954	test 3.7	2.47
January	1930—	4.041	" 3.7	2.47
February	1930—	4.039	" 3.7	2.43
February	1930—	3.970	" 3.5	2.43
March	1930—	4.002	" 3.6	2.41
March	1930—	4.077	" 3.8	2.41
April	1930—	4.116	" 3.9	2.40
April	1930—	4.079	" 3.8	2.40
May	1930—	4.074	" 3.8	2.27
May	1930—	3.681	" 3.9	2.27
June	1930—	3.578	" 3.6	2.12
June	1930—	3.608	" 3.7	2.12
July	1930—	3.574	" 3.6	2.34
July	1930—	3.768	" 3.4	2.34
August	1930—	3.882	" 3.4	2.64
August	1930—	3.955	" 3.6	2.64
September	1930—	3.989	" 3.6	2.73
September	1930—	3.829	" 3.2	2.73
October	1930—	3.911	" 3.4	2.60
October	1930—	3.901	" 3.4	2.60
November	1930—	3.694	" 3.5	2.44
November	1930—	3.583	" 3.5	2.44
December	1930—	3.580	" 3.5	2.12
December	1930—	3.268	" 3.6	2.12

Brief Regarding the Economic Advantage of the Dairy Production Adjunct to the Greater Boston Market

by

Ellsworth W. Bell
Extension Economist
Massachusetts State College

In order to bring to light the character of the economic forces in a milk market, a knowledge of the physical factors influencing the supply of milk and cream is necessary. Usually these factors are so highly relative that an empirical answer is the best that can be offered.

The milk production of Massachusetts dairy industry is intended wholly for sale as Class I or fluid milk. When an enterprise of milk production is undertaken by an operator

on the dairy farms of this area, the whole farm organization scheme is fitted for this particular production, milk for fluid use only. It is a fact that the total milk produced in this area, approximately 800 million pounds a year, does not all sell for fluid milk. A portion is used for home consumption on the dairy farm and another quantity is fed to livestock. The remainder is sold as milk or cream in the markets of Massachusetts. A four year average of the years 1929-1932 shows that 87.6 percent of the milk produced in Massachusetts was sold as market milk. About 20 percent of this market milk was sold at retail or, in other words, from farm direct to the consumer and about 80 percent was sold at wholesale to handlers in the markets who in turn distributed to consumers. Massachusetts milk production is sold in all markets of the state, the principal being the "secondary markets". However, about 15 percent of the milk used in the Greater Boston Market is supplied by Massachusetts dairymen. A minimum of milk is produced in Massachusetts and sold as cream.

Being adjacent to markets the dairymen command a natural sales advantage whereby it is taken first at the fluid price. The supply produced near to market as described above is in competition in the Boston Market with production in Vermont where market outlets average several hundred miles from production. While in Massachusetts 87.6 percent of the production was sold as market milk, during the same four year period 73.7 percnet (sic) of the production in Vermont was sold as market milk. Only about 5 percent of this amount was sold at retail and 95 percent was necessarily sold as wholesale.

About 25 percent of the market milk in Vermont is normally sold in the form of cream. Production in this area does not possess nearness to market which constitutes a natural advantage of sale in the higher price classification. Therefore, production in this area more removed from market is so designed as to produce an market a

constant part of its milk production as cream. As measured by pounds of milk yielded per cow it is not a prerequisite for dairy production in the area far removed from market to be conducted as efficiently as it is near to market. Records show that in Vermont a cow produces only about an average of 5000 pounds per year whereas in Massachusetts 6000 pounds will be produced in one year by one cow. In 1932 each dairy cow in Massachusetts averaged to return a gross income over twice as much as each cow in Vermont returned.

This is due largely to natural conditions dependent upon location in relation to distance to market which results in a requirement for more efficient and productive cows. From data published by the Bureau of Agricultural Economics in "Milk Production Trends" in 1932 the average price per 100 pounds of milk sold by dairy farmers in Massachusetts was $2.81 compared with $1.55 per 100 pounds in Vermont or a differential of $1.26 per 100 pounds.

Assuming a distance of 200 miles from Boston as average for the Vermont production 36 cents freight plus 23 cents station charge plus 3 cents can charge would give amount equal to 62 cents as tangible differentials accruing to the economic advantage of the nearby dairymen in Massachusetts due to location. The difference indicates however an additional amount of 64 cents. (62¢ + 64¢ = $1.26) This 64 cents per 100 pounds is less tangible but nevertheless exists due to peculiar advantages existing for disposal and sale of the milk at the higher market price.

Therefore, it is recognized that freight, country assembling expenses, container services, refrigeration and other charges are not required to the same degree with respect to milk produced nearby for fluid sale. In addition, it is recognized by sellers more remote from market that sellers near to market must receive an additional amount commensurate with their current opportunities of sales which are natural and economic to their location. This is

particularly necessary when a definite plan is established to provide a means whereby the various groups in the milk-shed will cooperate on an orderly plan to share the fluid sales of the market at a fair price.

Evidence is apparent that the majority of sellers are desirous of adopting such an orderly procedure through a regulated plan of equalizing the sales use of milk among the various shippers. It is further recognized by the majority of sellers that adequate location differentials must be allowed to those sellers near to markets thereby making it unnecessary for any group to cut their offering price in order to obtain its share of the market proceeds of fluid sales.

It is therefore necessary in the efforts to establish a workable plan designed to stabilize market conditions in the Boston area that the dairy industry in the near to market area be provided for in its true and natural location advantages. If these advantages now enjoyed are duly considered and fairly provided for the proposed plan has a better than reasonable chance of succeeding in its intended purpose.

It is recognized that undoubtedly considerable must be left to trial in determining what matter of price would be fair. Only good judgment in administration will ultimately yield the result. It must be further established that the right result may not be gained within the short time allowed, if provision is not made to correct without delay an established differential which may be inadequate or without justification due to changing conditions and trends constantly taking place in the distribution and production industry.

Some Reasons Why Milk Production Costs Are Higher in Massachusetts Than in Northern New England States

Higher Wage Rates

According to the Bureau of Agricultural Economics, United States Department of Agriculture monthly wage rates paid by farmers from 1930 to 1936 inclusive have averaged as follows:

	With Board	Without Board
Maine	$29.41	$45.69
New Hampshire	30.32	[illegible] 64
Vermont	28.18	[illegible] 29
Massachusetts	34.39	[illegible]

Allowing for value of board in cases where it is furnished by the farmer, this means that Massachusetts producers pay for farm labor about a third more than Maine and Vermont producers, and about 15% more than New Hampshire producers.

Less Land Available Per Unit of Livestock

According to Farm Management surveys in dairy sections, milk producers in each state have the following acreages of land available for each animal unit of livestock kept.

	Acres Tillable Land per Animal Unit	Acres Pasture Land per Animal Unit
Maine	?	?
New Hampshire	2.36	2.60
Vermont	2.44	2.58
Massachusetts	1.90	1.29

New Hampshire dairymen thus have 24 percent more tillable land, and Vermont dairymen 28 percent more for each animal unit of livestock than have Massachusetts dairymen. In terms of pasture land, New Hampshire and Vermont dairymen have double the amount of pasture for each animal unit of livestock kept.

This limited land area necessitates the purchase of large quantities of hay and also contributes to the higher value of hay at the farm. (See Comparative Hay Prices—middle page 3.)

More Purchased Grain Required in Producing Milk

Because of less land available for pasture and for roughage production, Massachusetts dairymen also find it necessary to use more purchased grain in the production of milk. Comparative grain requirements as determined by cost of milk production studies in the various states follow:

	Pounds Grain Required per 100 Pounds Milk
Maine	34.2
New Hampshire	30.6
Vermont	28.8
Massachusetts	37.5

This means that Massachusetts dairymen are required to feed 30 percent more grain than Vermont dairymen; 23 percent more than New Hampshire dairymen; and 10 percent more than Maine dairymen.

Fewer Cows Raised

Massachusetts dairymen, because of economic necessity, raise fewer cows for replacements than dairymen of Northern New England. According to the United States Tariff Commission study made a few years ago, Massachusetts dairymen were keeping 4.4 cows for each head of young cattle while dairymen of Northern New England were keeping from 2.2 to 2.6 cows for each head of young cattle. The Massachusetts areas included in this study are particularly typical of farms within the 40 mile zone from Boston.

The fact that Massachusetts dairymen raise fewer "replacements" than those of Northern New England means that more cows have to be purchased in Massachusetts with higher costs in maintaining herd numbers.

High Taxes and Real Estate Values

According to the 1935 Federal Census, farm real estate values per acre of land in Massachusetts were from 3.5 to 4 times as high in the Northern New England states. Comparative values follow:

	Farm Real Estate Value per Acre
Maine	$ 30.40
New Hampshire	31.64
Vermont	28.69
Massachusetts	116.44

From 1930 to 1935 farm real estate values declined 27 percent in Maine; 20 percent in New Hampshire; 23 percent in Vermont; and only 11 percent in Massachusetts.

According to figures published by the Bureau of Agricultural Economics (U. S. D. A. Miscellaneous Publication No. 262—issued February, 1937) real estate taxes per acre of land in Massachusetts in 1934 were 2.9 times as high as in Maine; 3.8 times as high as in New Hampshire; and 5.5 times as high as in Vermont. Comparative tax costs follow:

	Real Estate Taxes per Acre of Land
Maine	$ .77
New Hampshire	.58
Vermont	.40
Massachusetts	2.21

Higher real estate values on which to pay interest, and higher taxes mean higher "overhead" costs in producing milk.

The net result of all these things is a higher "per quart" or "per hundredweight" cost for producing milk in Massachusetts. This is shown by the Comparative Cost of Production figures on page 3 of this brief.

ESTIMATED COMPARATIVE COSTS OF PRODUCING MILK IN MASSACHUSETTS AND NORTHERN NEW ENGLAND STATES, AT PRICES PREVAILING FOR YEAR ENDING MAY 31, 1937

Requirements per 100 lbs. Milk:	Maine	New Hampshire	Vermont	Massachusetts
Grain — Pounds	34.2	30.6	28.8	37.5
*Silage — Pounds	70.2	65.3	170.0	90.0
Hay	105.7	85.3	90.0	76.0
Man Labor — Hours	3.24	3.03	3.1	2.65
Percent of Total Net Cost Represented by Above Items	88%	80%	92%	80%
Average Butter Fat Test	4%	4%	4.3%	3.9%
Average Production per Cow — Lbs. Milk	5191.	5155.	4819.	6250.
Prices of Materials: (June 1936 to May 1937)				
Grain per Ton (E.S. 20% Dairy Ration)	$45.00	$45.00	$45.00	$45.00
Loose Hay per Ton — Farm Price (U.S.D.A. Quotations)	9.30	12.52	10.89	17.78
*Silage per Ton	4.75	5.00	5.20	6.35
Labor per Hour (U.S.D.A. Quotations)	.208	.237	.206	.267
Cost per 100 lbs. Milk at Prices Given:				
Grain	$ .7695	$ .6885	$ .648	$ .8440
Silage	.167	.1640	.442	.285
Hay	.491	.534	.490	.675
All Feed	$ 1.4275	$ 1.3865	$ 1.580	$ 1.8040
Man Labor	.6740	.7180	.639	.707
Total Feed and Labor	$ 2.1015	$ 2.1045	$ 2.219	$ 2.5110
Total All Costs per Cwt	$ 2.38	$ 2.63	$ 2.40	$ 3.14
Total All Costs per Quart	5.11¢	5.65¢	5.16¢	6.75¢
Number Farms Included in Study	178	326	186	303
Sources of Information —	Maine Agr. Exp. Sta. Bul. 361 Pub. Jan. 1932	N.H. Agr. Exp. Sta. Bul. 260 Pub. Dec. 1931	Vt. Agr. Exp. Sta. Bul. 268 Pub. Apr. 1927	Unpublished data, Dept. Agr. Ec. and Farm Mgt. Mass. State College

* Including green feed.

** About 50% of value of Hay in Maine and Vermont; 40% in New Hampshire; and 36% in Massachusetts.

Brief of Manchester Dairy, Inc.

REGARDING: PROPOSAL TO AMEND ORDER NO. 4 REGULATING THE HANDLING OF MILK IN THE GREATER BOSTON, MASSACHUETTS, MARKETING AREA.

Article VIII, Section 4, Paragraph 3.

In proposed amendments to Milk Order No. 4, regulating the handling of milk in the Greater Boston, Massachusetts marketing area, "Location Differentials" are provided for. In Article VIII, Section 4, Paragraph 3, recognition is given to dairies located in a zone 40-80 miles distance from Boston. Manchester Dairies plant is the only milk receiving station located within these boundaries. Business conducted by the above named corporation was established in 1923. As a co-operative enterprise, was organized under the New Hampshire Co-operative Marketing Act, and was established a centralizing plant to care for milk supplies made in adjoining towns within an air-line radius of 30-40 miles. Steady growth of volume handled during the so-called depression years is significant of the fact that it serves a real purpose among dairy farmers in southern New Hampshire. Trade has been built in all the Merrimack River Valley cities, in the so-called North Shore territory which is specified as a part of Metropolitan Boston, as well as Boston proper. We were the pioneers here in New England in milk tank truck movements and in daily door to door service to meet the requirements of the retail buyers. Our ability to attract such buyers has enabled us to sell at top fluid prices nearly all of our membership production each year,—in other words, we have been able to secure new additional trade as rapidly as additional supplies were secured from the surrounding towns. The growth of the supply and the out-lets have been simultaneous. Such a program has enabled the Dairy to pay prices to its members which at all times were materially higher than receiving stations in northern New Hampshire, where for long periods they handled heavy supplies of milk which they could not sell in the fluid market.

As early as 1930 we began some jobbing business in addition to handling members' supplies. These jobbing activities include: milk, cream and butter. By jobbing business I refer to the purchase and selling of supplies from other creameries. Such jobbing activities have been almost wholly confined to purchasing from other co-operatives so that at no time have we been guilty of handling more than 15-20% from proprietary concerns.

The attached sheet labeled Exhibit No. 1 is a table which shows the total volume of milk furnished by our members during the year just preceding the first Federal Milk License, likewise it shows month by month the volume of sales and the percentage of sales against purchases, while the fourth column shows the purchases made from outside sources on a jobbing basis. It will be noted that during much of the year our sales exceeded the purchases from our members. On the same sheet we again show a table of performance eleven months following the cancellation of Order No. 4,—again it will be noted that ten of the eleven months we purchased substantial quantities of milk from other co-operatives to fill the requirements of our steady customers. This sheet should show even to the casual observer that previous to any regular marketing agreement as well as during the eleven months following we were able to sell substantial quantities of milk not furnished by our members and that in consequence our surplus losses for these two periods were practically negligible.

Now we refer to the table labeled Exhibit No. 2 in which we show the relations of the prices paid to our members for all milk as compared with those prices enjoyed by shippers in the 190-200 mile zone as of Boston. It will be noted that our prices ruled substantially higher. With a carlot freight rate of approximately twelve cents per hundredweight difference between Boston to Manchester and Boston to the 20th zone. The real premium over and above the difference of freight costs exceeded one cent per quart. Our ability to pay is largely an outcome of our lack of surplus milk to be manufactured. The profit on jobbing business is, of course, a contributing factor.

We had hoped to present to you a full ten-year period of prices and the percentages of surplus carried. We were unfortunate, however, in the spring of 1936 to be flooded out of our place of business by the memorable spring flood and practically all of our office records were badly damaged. In the confusion which naturally followed the catastrophe we made no effort to preserve our older records and this makes it impossible to send this ten-year record which we would like to do.

We lay claim and we hope that this brief furnishes convincing evidence that the size of premium for our location differential as offered in your tentative draft is wholly inadequate to furnish for this corporation the natural advantages already acquired—advantages which are not confined to any twelve months period but have been built into the institution over a period of years so that it has been an integral part of our prosperity.

Official statements were made at the public hearings held recently to the effect that Federal officials do not expect producers to yield natural advantages into the pool. This gives us encouragement and a basis for a petition that our particular problem, while minor in relation to the whole, will be given thoughtful consideration to the end that an upward revision be made of the premium allowances for producers in the preferred 40-80 mile zone. Such an act would provide for a preservation of the natural advantages which have been clearly outlined by this brief.

/s/ Carl A. Smith
Manager

MANCHESTER DAIRY, INC.

I, CARL A. SMITH, Manager of Manchester Dairy, Inc., being duly authorized, on oath depose and state that the facts contained in the foregoing four pages, each bearing my signature, are true and correct to the best of my knowledge and belief.

/s/ Carl A Smith

NOW COMES, CARL A. SMITH, Manager of Manchester Dairy, Inc. duly authorized, and makes oath that the foregoing statements are true and correct to the best of his knowledge and belief.

/s/ Kenneth F. Graf
Notary Public

My Commission expires 7/29/37.

EXHIBIT NO. 1

	1	2	3	4
1932				
November	1,070,486	1,254,967	1.172	292,935
December	1,111,373	1,235,469	1.111	249,691
1933				
January	1,210,033	1,222,125	1.009	137,686
February	1,059,848	1,114,674	1.051	56,069
March	1,186,789	1,185,694	.999	109,477
April	1,134,285	1,123,379	.990	121,602
May	1,202,343	1,115,973	.928	97,790
June	1,278,558	1,227,831	.960	107,070
July	1,256,696	1,298,731	1.033	266,840
August	1,282,930	1,492,741	1.163	395,955
September	1,275,837	1,184,977	.928	116,960
October	1,322,588	1,127,214	.852	74,802
1936				
August	1,255,369	1,112,891	.886	-
September	1,197,812	1,086,551	.907	6,545
October	1,179,446	1,289,565	1.093	125,885
November	1,024,553	1,364,127	1.331	312,290
December	1,092,824	1,582,743	1.448	435,115
1937				
January	1,127,345	1,429,453	1.267	236,187
February	1,009,481	1,266,234	1.254	112,108
March	1,129,956	1,432,482	1.267	312,086
April	1,124,542	1,285,454	1.143	167,919
May	1,250,004	1,243,399	.994	63,662
June	1,275,040	1,330,416	1.043	43,691

Column No. 1 represents pounds of milk purchased from members
" No. 2 " pounds of milk sold
" No. 3 " percentage of milk sold (members)
" No. 4 " pounds of milk purchased from outside sources

EXHIBIT NO. 2

	1	2	3
1929	$3.37	$2.72	$0.65
1930	3.29	2.41	.88
1931	2.22	1.75	.47
1932	2.08	1.53	.45
1933	1.99	1.43	.56
1934	2.206	1.78	.428
1935	2.36	1.639	.73
1936	2.34	1.85	.49
AVERAGE	$2.482	$1.888	$0.594

Column No. 1 represents average price paid producers by Manchester Dairy, Inc.

" No. 2 " average price paid producers in 200 mile zone.

" No. 3 " difference between No. 1 and No. 2.

Brief of Donald B. MacCollom, Dairy Farmer of Clinton, Mass.

A BRIEF SUBMITTED REGARDING THE PROPOSAL TO AMEND THE TENTATIVELY APPROVED MARKETING AGREEMENT AND ORDER NO. 4 REGULATING THE HANDLING OF MILK IN THE GREATER BOSTON, MASSACHUSETTS, MARKETING AREA.

It is my purpose to point out that location differentials such as are called for in paragraphs 3 and 4 of Section 4, Article VIII, have a long-standing precedent in the Boston market. This preferential price set-up may be attributed to freshness of the product, stricter sanitary regulation due to nearness to inspectors' home cities, and the wish of the dealers to have prompt access to and intimate personal contact with their producers of premium grades of milk.

To substantiate these differentials Mr. W. H. Bronson of the New England Milk Producers' Association has offered as evidence a comparison of prices paid by the J. B. Prescott C. for nearby milk and the 191-200 mile zone price for the period from 1923 to 1932 inclusive. The average differential for that period was $1.04. The highest differential of $1.20, paid for 1928, was 26.8% of the nearby price. The lowest was the 73¢ differential paid for 1932 when all prices were approaching butterfat levels. It amounted to 32.3% of the nearby price.

Prices paid to producers of the Deerfoot Farms Dairy in Southborough, Mass., 70% of whose fluid milk sales are in the Boston area, for the years 1923 to 1932, as taken by me from the company's monthly statements to two producers, are as follows:

1923	$3.27	1928	$3.63
1924	2.99	1929	3.69
1925	3.28	1930	3.62
1926	3.37	1931	2.85
1927	3.37	1932	2.46

These prices are for 3.7% milk.

This plant is located more than 14 miles from Boston and milk shipped to it is subject to a deduction of 10¢ per cwt. under paragraph 2 of Section 5, Article VIII of the amendment.

The average differential between these prices and those for the 191-200 mile zone submitted by Mr. W. H. Bronson, as mentioned above, is 75.6¢ per cwt. for the 5 years from 1923 to 1927 inclusive. It is $1.036 for the 5 years from 1928 to 1932 inclusive. The ten year average differential is 89.6¢ per cwt., or 99.6¢ per cwt. if we assume that the Deerfoot Farms Dairy has deducted the 10¢ per cwt. called for by the Amendment, due to the distance of their plant from their city delivery station.

We would further point out that under the present order, which it is proposed to amend, producers in the 40 mile zone are paid 100% Class I price for all shipments within ratings.

It is proposed to eliminate ratings under this amendment. Many of the producers in the 40-mile zone have made milk under ratings for a good many years, practically all of them are in the habit of producing very nearly an even flow of milk throughout the year, and in some cases this evenness of production must be continued in order to keep special markets where premiums are paid for high quality milk.

Due to the inability of many of us to protect ourselves against fluctuations in the composite price which may result from high seasonal surpluses, we would like to make a proposal to apply to the 40-mile zone.

The present method of computing the composite price would apply as long as the surplus does not exceed 50% on the one hand, and as long as the computed price for the 40-mile zone does not exceed the published Class I price on the other. In other words, the producers in the 40-mile zone would share in the surplus on the market only up to 50%, and would at no time receive more than the published Class I price.

In Article VIII, Section 3, entitled "Butterfat Differential", a formula for the payment of a butterfat differential is set up which works out so that the dealer pays less for butterfat in the milk which he purchases from his producers for fluid distribution than he pays for butterfat in cream on the open market. We believe that the deuction of 8¢ made in the formula was made to reduce the deduction from the Class I price to which the producers of milk testing less than 3.7% would be subjected. Due to dealer competition for fluid sales on a butterfat or creamline basis, the butterfat test of all the milk retailed on the Boston market exceeds the test of all the milk produced for the market. As the cream which must necessarily be used for standardization purposes represents a higher cost per pound of butterfat than the proposed differential requires the dealer to pay for additional butterfat in fluid milk, there is a constant pressure by dealers on producers

to produce higher test milk. The low butterfat differential does not, of course, adequately compensate for this higher test. Many producers have spent years and money in building up the herds which the dealers now insist they break up. In order to stop this well-established movement we suggest that the butterfat differential be figured by the formula given in paragraph 3, Section 1, Article IV of the Amendment, namely, to divide the cream price by 330.

Due to the present disparity in the Boston and New York City prices for fluid milk, we feel that in order to prevent an undue shift from the New York to the Boston market by producers on the border between the two milksheds, the period of time required to earn a share in the Boston market pool as set up in Paragraph 2 of Section 1, Article VIII, should be increased from two full calendar months following the first day of the next succeeding month after commencing shipments, to three full calendar months following said first day.

Nominally the price on the Boston market up through June 30th has been 6¼¢ per quart for Class I milk. The proposed amendment calls for a price based on 7¢ per quart for Class I milk. The Massachusetts Milk Control Board has set a resale price in Boston of 13¢ per house deliveries. This price set-up means an advance of ¼¢ per quart in the dealer spread. The producers in the 40-mile zone feel that while dealer costs may have advanced, producer costs, particularly for grain and labor, have advanced so much more as to be beyond comparison. In giving way to dealers' demands for an increased spread, consideration has been confined too generally to the purely fluid milk aspect of the dealers' business. In asking that the Class I price in the amendment be set at 7¼¢ per quart while the Massachusetts Milk Control Board resale price remains at 13¢, rial cost of a half-pint bottle of extra-heavy cream is 8¾¢. sales. At $14.00 per 40-quart jug of 40% cream, the material cost of a half-pint bottle of extra-heavy cream is 8¼¢. After adding the 4¢ which the Rittenhouse report fixes as the cost of retail distribution of half-pints of cream, 6¼¢ remain for net profit to the dealer on this type of trade,—a net margin of 71.4% over material cost.

So long as the price of New England cream from inspected sources is fixed by the price at which dealers can import uninspected cream from points as far distant as Mississippi and Kansas, we ask that the exorbitant profits which dealers receive from this cream trade be considered in fixing producer prices for Class I milk. The two classes of trade are inseparable for all practical purposes.

As further justification for the location differentials beforementioned we wish to offer evidence as to the disparity in costs of production, with especial reference as to taxes and labor, between Massachusetts and northern New England states. From the U.S. Census of Agriculture for 1930, the average taxes per acre paid by Maine farmers was 74¢, by New Hampshire farmers 79¢, by Vermont farmers 56¢, and by Massachusetts farmers $2.04.

The average monthly wages for farm labor in 1932 from statistics of the New England Crop Reporting Service of the U.S. Department of Agriculture was $27 with board and $43.50 without board for the three northern New England states. Comparable figures for Massachusetts from the same sources were $34.37 and $60.31.

I live in Sterling, Massachusetts. My mail address is Sterling Jct., Mass. I ship an average of 650 quarts of milk per day to the Deerfoot Farms Dairy in Southborough, Mass. This testimony is offered at the request of the Federated Dairymen's Associations of Massachusetts, having a membership of 5,000 dairymen.

/s/ Donald B MacCollom

Clinton, Mass. July 7, 1937.

Worcester, ss:

Subscribed and sworn to before me this seventh day of July, 1937.

/s/ G. L. Hammon
Notary Public

BRIEF OF NEAR BY MILK PRODUCERS ASSOCIATION

Harold McNiff, Secretary, Groton, Mass.

In addition to the paper which was presented in the testimony of John L. Carten, Jr. for the Near By Milk Producers Association at the hearing July 1 in Boston, the Near By Milk Producers Association wishes to submit the following points for the consideration of the AAA on Article VIII, Section 4, paragraph 4, of the proposed amendment to the License:

I - Mr. Aplin observed at the hearing that 36¢ is a differential of 44% over the composite price expected in the 200 mile zone under the new License which is the same percentage shown by Mr. Bronson's ten year average differential from 1922 to 1932. If 44% of the 200 mile price is the fair differential for local producers then whenever the composite price changes the 36¢ per cwt will beocme unfair and our producers will swarm to the office of the Market Administrator to remind him of it and to demand an adjustment. It will greatly facilitate the administration of the License to give the near by producers the flat 46¢ they insist on and let that amount ride unchanged with any composite price.

II - The 46¢ per cwt, or one dollar differential over the 200 mile zone which our association asks is less than either of Mr Bronson's figures, $1.16 for Deerfoot Producers, and $1.04 for Prescott Producers. If Mr. Bronson had taken a ten year average from 1920 to 1930 the differential would have been even more, between $1.20 and $1.30 per cwt. Figures submitted in our testimony at the hearing show that in September 1920 milk delivered to Hood at Salem, Mass. brought a flat price, regardless of weight or test, of $4.509 per 40 quart jug, a differential of about $1.703 over the 200 mile price. In September 1921 milk at Salem brought $4.544 per cwt for 3.67 milk, a differential of about $1.724. Both these prices include a cent a quart Grade A premium. In December 1922 milk at Salem brought $3.921 for 3.65 milk, a differential of about $1.071. The 1922 price did not include a grade A premium, this being paid separately in 1922. The balance in the shrinkage in our differential can be attributed to the

NEMPA getting dealers not to deduct freight charges in figuring Class II prices. This was done in 1922 and as a result dealers lowered the Class I price FOB Boston enough so that their milk cost them no more than before the bargain with the NEMPA and the near by producers received less. It is unfair to local producers to start a ten year average with 1922.

III - The five directors of the Near By Milk Producers Association represent a fair cross-section of Essex County and Middlesex County dairymen. It may interest the AAA to know that when they met to discuss the License, two directors were in favor of the License, two were opposed, and one was undecided. After a long discussion they reached a unanimous decision on two points. All five directors agreed to support the License if the forty mile producers received at least 46¢ differential. And all five agreed to oppose the License with every means in their power if forty mile producers received less than a 46¢ differential. It is the hope of our association that the License to be voted on will either pay forty mile producers on a ten per cent surplus the year around, or pay a flat 46¢ differential. If it does either we can promise the support of our members to the License and the support of the many Essex and Middlesex County producers outside our association who listen to our opinion with respect.

NEAR BY MILK PRODUCERS ASSOCIATION

/s/ John L. Carten, Jr.
Vice President

[Jurat Omitted in Printing]

Portions of 1951 Hearings and Order

USDA Docket AO 14-A20—Portions of Testimony From Hearings Held on April 2-7, 1951

From Notice in Federal Register, Sept. 12, 1951, Vol. 16, p. 9250.

HANDLING OF MILK IN GREATER BOSTON, MASS., MARKETING AREA

DECISION WITH RESPECT TO A PROPOSED MARKETING AGREEMENT AND A PROPOSED ORDER AMENDING THE ORDER NOW IN EFFECT

The material issues presented on the record of the hearing were whether:

• • • • • • • • • • •

(4) The present location differentials paid to nearby producers should be eliminated;

• • • • • • • • • • •

(4) No change should be made at this time in the location differentials required to be paid to nearby producers. Certain producer interests proposed that § 904.9 (e) of the order, which sets forth the conditions for and amount of location differentials to be paid, be deleted. However, in support of their proposal they presented no materia. facts different from those considered in establishing specified location differentials as a part of the order provisions.

• • • • • • • • • • •

714 **Testimony of Clifton Whitney**

At recent hearings on Federal orders for Worcester, Springfield and Lowell-Lawrence one of the reasons advanced for establishing special location differentials for nearby producers at the expense of more distant producers has been the fact that they exist under the Boston order. For example, I quote from the hearing record on amendments to the Lowell-Lawrence order, dated June 28, 1950, page 265,—"First, the basis of reasons for establishment of location differentials payable to nearby producers:—one,—is the fact of their existence under the Boston order".

715 In the decision on this hearing, the Government states "The nearby differential plan has been a part of the payment plan in the Boston milk order for many years. The proposed differential plan is necessary in the Lowell-Lawrence market to reflect this customary differential.

It, therefore, becomes necessary to carefully examine the justification for these special location differentials under the Boston order if they are to set the pattern not only for Boston but for other Federal markets in New England.

We are aware that the act provides that prices shall be uniform to handlers, subject to adjustments for customary differentials. We do not believe, however, that the act was intended to be an instrument to freeze existing marketing practices for all time to come. One indication of that fact is the provision for amending marketing orders issued thereunder.

The question raised is how long should order No. 4 be the means for perpetuating special differentials to nearby producers. We feel that the time has come for termination of these special location differentials under the minimum price provisions of the Boston order.

During the past decade, the number of producers within the 40-mile zone has declined more than half even with the

46-cent subsidy paid by more distant producers. Alternative opportunities and the continued growth of
716 cities in the geographical area have been among the principal factors responsible for this change. It is enevitable (sic) that land in this area continues to become more valuable for other uses than dairy farming. Capital invested in other enterprises in this area yields greater returns than from dairy farming.

As a result of these economic developments, dairy farmers close to the market are being outbid for their land and capital. They, in turn, cite the high cost of production as a reason for special location differentials. It is time that we remove from the Boston order the provision which encourages nearby farmers to oppose the gradual economic trends and development in this 40-mile metropolitan area at the expense of producers in Maine, New Hampshire, Vermont and part of New York State.

If these special location differentials can still be called customary it is primarily because the Boston milk order has been the instrument which has preserved them.

One of the common arguments advanced as to why nearby producers should receive a special premium for their milk, over and above the premium reflected by freight advantage, is that these producers produce more evenly than producers more distant from the market. We contend that evenness of production provides no justification for establishing location differentials. For the sake of the record, however, let us examine some facts on this
717 question of even production. The Market Administrator's monthly statements show the following information for 1950:

1950	Total Receipts of Milk (Thousands of Lbs.)	Receipts from Producers Over 80 Miles from Boston (Thousands of Lbs.)	% of Total
June	166,995	154,353	92.4
November	98,152	90,695	92.4

This comparison shows that receipts from producers whose farms are located more than 80 miles from Boston shipped exactly the same proportion of the total receipts for the market as a whole in June as they did in November—namely, 92.4%. This would indicate that there is little justification to be found in these figures for penalizing more distant producers with a deduction from the pool called "Location differentials" for nearby producers.

Next, let us examine a comparison of the daily average deliveries per producer during the months of highest and lowest productions this past year, by areas, according to their distance from the Boston market.

I would like to offer this as an exhibit.

Examiner Rogers: Give me the title of the document.

The Witness: The title is "Comparison of Daily Average Deliveries Per Producer During the Months of Highest and Lowest Production in 1950, by areas, according to distance from Boston."

Examiner Rogers: The document referred to will be marked for identification as Exhibit No. 20.

718 (The document above-referred to, submitted by Witness Whitney, was marked for identification as Exhibit No. 20)

Examiner Rogers: Was the exhibit prepared under your direction and supervision?

The Witness: That is correct.

Examiner Rogers: And I believe you indicated that the statistics were taken from the Market Administrator's monthly statistics?

The Witness: That is correct.

Examiner Rogers: Any questions with reference to Exhibit No. 20?

Do you want to offer it for the record?

The Witness: Yes, I do.

Examiner Rogers: Apparently there are no questions. Exhibit No. 20 will be received in evidence.

(The document marked Exhibit No. 20 for identification, submitted by Witness Whitney, was received in evidence.)

Examiner Rogers: Proceed.

The Witness: It can be seen from this table that producers within the 40-mile zone produce 100 pounds more milk each day in the month of high production than they do in the month of low production, and that producers within the 41 to 80 mile zone produce 105 pounds
719 more milk each day in the month of high production than they do in the month of low production. In contrast, producers from the 11th to the 18th zones produce on an average 90 pounds per day or less in the month of highest production over the month of lowest production. In fact, the average producer from the 11th through the 22d zones inclusive produces less pounds of surplus milk in the months of high production compared with the month of low production than do producers within the 40-mile and 41 to 80 mile areas.

We contend that the pattern of seasonal pricing provided in the Class I pricing provisions of the order has provided encouragement for more even production. Any further encouragement to changes in the producers seasonal production patterns should be provided in this same section. This method compensates all producers equally, and permits each producer to determine his individual production pattern on an equal footing.

If a producer can command a premium for his milk due to quality, nearness to the market or any other reason, he can still command it under the minimum price provisions of the proposed order. If that extra quality or service rendered by a producer has a real value to the handler of that milk, than (sic) the handler should pay for it and not the producer on the outside of some arbitrary line.

The assertion is made that producers near a market
720 have the alternative of delivering their own milk to consumers and that somehow or other this opportunity justifies their receiving a special slice from the total pool payments in addition to the differences in freight. This thinking seems particularly unjustified in case of

producers living from 41 to 80 miles from the market. It's a long haul for bottled milk in addition to the fact that if they are interested in the retailing of milk there are sizeable cities and towns much closer to them.

With regard to those producers living close enough to the Boston marketing area who wish to engage in retail distribution following the removal of locations differentials, let them do so. They will have substantial investments to make in pasteurization and other plant equipment; delivery trucks; and bottles. They will need additional labor of various skills. Let them do it. We believe any loss of Class I sales will be more than offset by ridding ourselves of these special location differentials in excess of a quarter of a million dollars annually.

Times have changed. Raw milk has been replaced with pasteurized milk. Deliverymen on milk routes have become unionized. Transportation facilities have been improved. Milk quality has been improved. No provisions in the order provide that we should follow the customary practices of 15 or 20 years ago with regard to these factors
721 which influence the pricing of milk. No more is there reason for maintaining these out-dated special location differentials supposed to represent values which no longer exist.

Q. (By Mrs. Henderson) Have you examined the studies that have been made on individual responses to seasonal factors? A. No, I don't believe I am sufficiently familiar to discuss them.

Q. Your study of seasonal variation was limited to data for the year of 1950? A. I just took the most recent year's figures, yes, in this comparison that I presented.

Q. You think that would be a reliable basis for judging seasonality to examine just one year? A. Well, we could go back one or two years, but introduction of the seasonal pricing provisions which have incurred producers to become more even of the proposed order have been in effect a comparatively short time and I think it would be normal to expect that

1950 would be as soon as you could expect producers to adjust and get their production over. I do recall a study that was made by Martin Parsons which indicated that producers have a short and long time lag in their response to price stimulant and in this case, if I recall correctly, there was a two year lag which I would assume would apply. In other words, 1950 is about the first year you would [722] expect to begin to measure the affect of taking 44¢ higher Class I price in October, November and December and corresponding lower price in flush season.

Q. You were testifying concerning the normal area of distribution from bottling plants, could you give us something more specific on that? A. What page are you reading?

Q. Bottom of Page 4. I would just like to have your basis for defining what is reasonable and unreasonable in terms of distances for bottled milk to be hauled. A. In this case we are talking about producers. If a producer wants to undertake to market his milk and he lies, say, between the 41 and 80 mile line, if I recall there never have been more than two or three producers who attempted to deliver—I don't know if I know of any cases where there has been a producer living from 41 to 80 miles from the Boston market who attempted to market his own production within the marketing area.

Q. You have made a study of that, have you? A. No, I am just drawing upon—I don't know of any. I did think when I first started to speak I had heard there was some particular arrangement where I believe it was Seven Oakes Dairy, that history would show attempted to set up its own farm production, which might be construed to fall within this category; they agreed to buy the cows from the farmer [723] and have the farmer ship milk, and I don't know if that was beyond the 41 mile zone.

Q. Is it your impression that this proposal would change the structure of prices to producers in the New England Region? A. That is a pretty relative question. Could you limit it a little more?

Q. I think it is a pretty important question. This whole scheme is directed toward establishing a frame work of prices

within a region and so it is important to know what changes you would expect to result from this proposal in the general structure of prices, comparative prices. A. In this particular case we are discussing the Boston market.

Q. (By Mr. Walsh) Mr. Whitney, you already said on Page 1 location differentials ought to set the pattern not only for Boston but other Federal markets in New England. A. I was referring to the fact this particular pool is for Boston. This implication is much wider as I have indicated, but I was just going to describe the Boston end of it first.

As far as I can see in Boston, as I have indicated previously here, one of these things is justified or it isn't. Now if it is not justified, I think that there is a need to make a correction, even though it does have an influence on the over all pricing structure.

Q. How can we tell if what you are proposing is justified [724] unless we know what it is going to result in? That is what I would like to get an idea of what you anticipate would happen if your proposal were adopted. A. If this proposal were adopted the first difference that would take place is a quarter of a million dollars would be distributed in what we feel is a more equitable manner.

Q. What money is that now? A. On Page 5 I stated at the end of the first paragraph approximately a quarter of a million dollars annually. The reason I put that in there is because we hear this affects the price per hundred weight up country only a fraction of a cent, but it is a fairly sizeable amount of money we are discussing.

Q. You mean then you would expect the net effect of the proposal to increase the price to producers in Northern Vermont? A. To a very slight extent.

Q. (By Mr. Derr) Mr. Whitney, what do you think—strike that, I am sorry.

If your proposal were adopted, what effect do you think it would have upon the seasonality of production upon the nearby farmers? A. Well, it would place them in the same position as far as seasonal production goes and the price they

receive to a seasonal pattern in exactly an equal footing with producer up country.

Q. From what do you think that effect would be then? [725] A. Anything I offer would be only an opinion. I don't think it would make any difference in the seasonal production.

Q. Well if it is true, if it were true for some reason nearby milk is more valuable to handlers, do you think it would be in order to adjust the freight differences presently provided to handlers? A. I don't think any adjustment should be made in the freight rate based on some other reason than the actual freight rates.

Q. If the milk is more valuable to handlers, do you think the more distant farmers should be required to pay the freight, or should the handler pay it? A. Do I think that the handler or the producer should pay the freight on more distant milk?

Q. If nearby milk is more valuable to the handler, which seems to be implied in a special payment provided to nearby farmers, do you think that the more distant farmer should be required to stand the freight differential bringing that milk to market, or should the handler himself pay it? A. Well emphasizing the first "if", yes.

Q. Do you have any other comments? A. Well, we don't feel that a quart of milk produced in Massachusetts is more valuable to a Boston consumer than a quart of milk produced in Jericho, Vermont.

* * *

726 **Testimony of Chester Smith**

The Witness: This is not the proposal of the organization which I represent listed in the hearing notice, but the general economic position of the organizations I represent.

In general, this is the same as that expressed by Northern Farms. I am not sure that a case has been made by the testimony offered by Mr. Whitney. I have not made any particularly exhaustive studies into the various elements of this problem. I do believe from general familiarity of this market for quite a long time, both up country and other dairies that there are quite a number of angles to

the problem, it is a complex one and the general structure of milk prices is involved.

I am also convinced, although I am not prepared at the moment to offer detailed supporting statistical information

that this section 9(c) of the Boston Order has no
728 economic justification; that it is becoming worse as it has since January 1, 1950, when it now becomes the keystone of the arch which supports similar location differentials in three other Federal Orders, Worcester, Springfield and Lowell-Lawrence, the whole sytem in general, it seems to me, is not much more or less in effect than the sharp and clear economic trade barrier which starts at a radius of 80 miles of Boston at that point there is a hurdle; this is a fence 23¢ high, and as you move in and get to a radius of 40 miles there is another fence on top of that of an additional 23¢. If that 46¢ and 23¢ respectively are justifications for more even production, then certainly geographic farm location is certainly a very, very crude testimony of where they should be applied.

There is specific authorization in the Marketing Act for plans and techniques generally known as the base rating plan, but as the law says based on marketing during a representative period of time.

And there are numerous precedents and other orders and in other markets without orders for techniques for analyzing the problem of seasonality of production.

If the technique of a particular payment came out of the pool, out of the value of all members, all producers is justified, and I think it may be, as an inducement for more

even production, then any producer no matter where
729 located in the milkshed should have such opportunity to earn that premium as any other producer.

I venture to say that an analysis of the record of say 5,000 producers, up country producers, would reveal at least several hundred. I am sure they would reveal many more producers located in the distant zones who as individuals have more even production than these particular

producers in the 40 mile zone and the 80 mile zone who are now getting back those premiums just because their farm is located there.

It is true in general the whole group has evener production than the milkshed as a whole, but I have looked and I have listed lots of individual farm production patterns seasonality and know that there is a wide range even in a small locality, so that within this 40 and 80 mile zone, while the production is evener than for the milkshed as a whole, there are no doubt numerous producers who are just as uneven as the most uneven of up country producers, and conversely there are no doubt many up country producers who are just as even as the group within 40 miles and 80 miles, as a whole.

As one example, Mr. Montgomery, a producer of Randolph, Vermont testified up in Burlington that he produces milk almost exactly evenly on his farm the year round. He is within the neighborhood of 150 and 160 miles from Boston. No doubt there are many others like him, and if there is justification for an evenness of pro-
730 duction incentive of that type, then it seems to me it is quite unfair if all producers in the milkshed do not have an opportunity to earn it.

That certainly would be a much more scientific basis than the present plan. I don't want to take up time by laboring that point any further because that is not precisely the proposal. All I would say is for organizations who take positions in hearings here, characterizing or indicating a conclusion from presumed knowledge that the operations of other organizations are inefficient and certain changes ought to be made, I cite specifically the conclusion by one witness that it is a known fact that Milton Cooperative, for example, is inefficient to the extent of keeping a feeder plant system in operation and it ought to close some and concentrate their milk in one plant, I will say that to have to subsidize these producers in the 40 mile zone and 80 mile zone is certainly an indication that we are keeping even,

efficient production in this milkshed. And the sooner we eliminate that drag on the rest of the producers, I think the more economic justice we will have for all producers in the market.

Our organization would be glad to see this proposal adopted, but we do feel that it is quite an involved question, and that even though by any possibility it is not adopted, it certainly is of concern to the great majority of producers in the milkshed of sufficient financial magnitude to warrant [731] a comprehensive and exhaustive study be started to promptly work out just what all the ramifications of this thing are.

* * *

[734] TESTIMONY OF C. W. SWONGER

resumed the stand and testified further as follows:

THE WITNESS: I am not sure whether Mr. Whitney understands the order or the effect of his proposal. Section 9(e), which Northern Farms proposes to eliminate from the order, provides for both location differentials (as commonly referred to) and for transportation differentials applicable to milk received from producers at country plants. Northern Farms would abolish both. It is an interesting hypothesis, but we doubt if the order can be used to abolish transportation costs, at least in the present state of technological progress.

One result that would flow from adoption of Mr. Whitney's proposal would be to bankrupt the pool. Handlers presumably would continue to be charged for their milk in accordance with the zone transportation differentials set forth in Section 7(c), and credited with payments to their producers at the blended price, without any transportation differentials. The pool would make up the difference, but from what source is not clear.

Since we understand that Mr. Whitney intended to aim his attack at the differentials paid to nearby producers, [735] the remainder of our testimony is directed to that feature of the order.

The subject of location differentials has been the chief stock in trade of Northern Farms for years. It has been used

for membership purposes, and to play one portion of the milkshed against another. This proposal illustrates a problem that faces a regional organization such as NEMPA in working to develop stable marketing conditions for all producers in New England. In southern New England, we have to stand off the attacks of people like Mr. Abrams, Mr. Gahan, and others, who like to label us as a northern New England outfit; and in northern New England we are referred to as a southern New England organization.

The present proposal relates only to Boston, but it involves all of the federal orders in secondary markets of New England. A similar proposal has been made by Northern Farms for consideration in the Lowell-Lawrence hearing, but no such proposal was made for Worcester or Springfield. Apparently, location differentials are all right for Worcester and Springfield, but not for Boston or Lowell-Lawrence. What this would do to price relationships between the various federal order markets, I think is sufficiently apparent.

The principle of location differentials, paid to nearby producers, has been confirmed by three separate decisions of the Secretary of Agriculture, within the last two years. [736] I refer to the Decision on the Springfield, Massachusetts, order issued November 18, 1949; the Decision on the Worcester order, issued the same date; and the Decision on the Lowell-Lawrence order issued September 14, 1950—and request that the Secretary take notice of these three decisions. Two of these decisions arose out of original hearings, and applied to new markets. The other, in Lowell-Lawrence, was in connection with conversion of that order to a market pool.

In each of these hearings, Northern Farms appeared for the purpose of opposing location differentials to nearby producers. It would not have been possible, or equitable, to adopt federal orders in these markets without a provision for location differentials. As we pointed out in the hearings, if all that nearby producers in these markets can expect to receive is the Boston blend price plus transportation, then they do not need a federal order. They could obtain that much without any regulation. They had in fact obtained more. The record showed

in each case, that despite the competition of unregulated milk, and in Lowell-Lawrence the inadequacies of a dealer pool, nearby producers had continued over the years to receive blended prices which were about 1¢ per quart higher than could be explained on the basis of transportation cost on up country supplies. In opposing location differentials, Northern Farms was opposing the adoption of federal orders in these markets.

[737] I want to amplify that point. The standard charge made by Northern Farms' representatives for years, has been that location differentials "subsidize" the nearby producers. The fact is that nearby producers have always been able to sell a higher proportion of their milk in Class I, and that situation existed long before federal orders. Northern Farms was as interested—or should have been as interested—as any other group of producers in stabilizing marketing conditions in southern New England. Federal orders were the only means of stablizing marketing conditions, and of insuring equal competitive opportunity for the sale of the milk of their producers in the markets of southern New England. It would not have been possible, to adopt such orders in secondary markets of southern New England, without recognition of the differential value of the milk produced near the market. The orders would not have been acceptable to producers in the markets involved. Northern Farms took no part in developing federal orders in these markets, but confined its activities to opposing location differentials which were an essential condition if effective regulation was to be adopted. If Northern Farms' position had prevailed, it would have meant turning over these markets completely to L-C and unregulated milk. Their members, together with all other Boston producers, would have been unable to compete for the sale of Class I milk in these markets, and more of their [738] members' milk would have gone into Class II or into butter.

Turning more particularly to Boston, the basis for location differentials rests upon at least three important facts. One is the existence of alternative marketing opportunities with respect to producers located in fairly close proximity to the

market. Producers in the differential area are close to urban centers and have the opportunity to sell to any one of a number of dealers. If they do not like the price they are receiving from their dealer, there is always the possibility of their going into direct retail distribution. This would mean a loss of Class I sales to the pool, and rather than suffer such loss of sales, it has been considered desirable to recognize such alternative marketing opportunities in the form of a higher blend price to nearby producers. It is sometimes argued that this opportunity is less today, with expensive equipment and stricter Board of Health requirements relating to milk handling and distribution, but there are handlers in the market who make a business of processing and bottling milk for other producer-handlers, and more of these arrangements could be made.

A second factor has been that of more even supply. Nearby producers on the whole have done a better job of adjusting the seasonality of their production to the requirements of their dealers and the fluid milk needs of the market. This is apparent from an examination of the seasonality of [739] production for various zones in the Boston milkshed. We submit as an exhibit, a table comparing Average Deliveries Per Day Per Dairy of producers delivering milk to plants located in various zones. The table shows average daily deliveries per producer for June and November 1950, and the ratio of June-to-November deliveries in various zones.

EXAMINER ROGERS: The document referred to will be marked for identification as Exhibit No. 21.

(The document above-referred to, submitted by Witness Swonger, was marked for identification as Exhibit No. 21.)

THE WITNESS: This table shows, in general, that the seasonality of production increases with increasing distance from the market. Producers delivering to city plants, who are essentially the producers covered by location differentials, showed a June-to-November ratio of 124 per cent. Their average deliveries in June were 124 per cent of their November deliveries. The June-to-November ratio of deliveries at plants in the 20th zone was 145 per cent; in the 25th zone, it was 186 per cent; and beyond the 26th zone, it exceeded 200

per cent. The average for the milkshed as a whole was 161 per cent.

It is obvious that the seasonal variation in production is widest in the most distant areas of the milkshed. Location differentials are a means of cushioning the nearby-producer from having to absorb the heavy surplus of the more [740] uneven producers located further distant from the market. The nearby producer does not create, nor is he expected to carry, the same proportion of surplus as does the more uneven producer located further distant from the market. It may be said that rating plans would be a more selective way of rewarding even production. But rating plans are anathema to many producers in northern New England, and location differentials have been used instead, to recognize the more even production of producers located nearer to the market.

The other factor, on which there was extensive testimony in Boston at the time the present system of location differentials was adopted, was that of historical price relationships. This testimony showed that over a period of years prior to regulation, nearby producers in Boston had received prices approximately 1¢ per quart higher than could be explained solely on the basis of transportation costs. Producers located near the market were able to sell a larger proportion of their milk as Class I. The federal order did not create this situation. It existed before regulation. The federal order recognized these natural marketing advantages, by provision of location differentials to nearby producers.

It is true, of course, that market-wide equalization has now obscured the measure of advantage in price or in utilization of the nearby producers in Boston. They have been melted into a marketing structure in which competitive [741] forces do not freely operate. There are numerous markets, however, in southern New England, which do not operate under federal orders and make no provision for location differentials. Prices to producers in these markets are generally as high—in many cases, higher—than to nearby producers in Boston. Included here are the markets of Rhode Island and Connecticut, as well as lesser markets in southern New Hampshire and in Massachusetts.

I would like at this point to offer as an exhibit a table and chart showing blended prices to nearby producers in various markets of southern New England, by months, for 1950. This table and chart was prepared originally by the Boston Market Administrator, and covers the markets of Boston, Lowell-Lawrence, Springfield, Worcester, Fall River, Providence, Rhode Island and Connecticut.

EXAMINER ROGERS: The document referred to will be marked for identification as Exhibit No. 22.

(The document above-referred to, submitted by Witness Swonger, was marked for identification as Exhibit No. 22.)

THE WITNESS: I have made slight additions to the original table and chart which I have indicated in the form of typewritten figures at the bottom of the page. The original table showed estimated prices for December, 1950, and I have substituted the final prices for that. I have [742] also added prices, final prices for January and February of 1951.

EXAMINER ROGERS: From where did you obtain the figures in Exhibit No. 22?

THE WITNESS: The prices for the federal order markets of Boston, Lowell-Lawrence, Springfield, Worcester and Fall River were all obtained from the Market Administrator's Office for those markets.

Prices for the Providence markets represents those published monthly by the Rhode Island Milk Control Board. Prices for Connecticut markets are those published by the Connecticut Milk Administrator.

EXAMINER ROGERS: You have crossed out the figures for December which is "estimated figures" and inserted the final figures below?

THE WITNESS: Yes.

EXAMINER ROGERS: Exhibit No. 22 was prepared under your direction and supervision?

THE WITNESS: Yes.

EXAMINER ROGERS: What about Exhibit No. 21? I notice the source is the Boston Milk Market Administrator, Monthly Statistics, is that correct?

THE WITNESS: Yes.

EXAMINER ROGERS: The exhibit was prepared under your direction and supervision?

[743] THE WITNESS: Yes.

EXAMINER ROGERS: Proceed.

THE WITNESS: These markets operate under varying conditions. The Boston, Springfield, and Worcester markets operated during 1950 under federal orders providing for market pools and location differentials to nearby producers. The Lowell-Lawrence market was under a federal order dealer pool until October, 1950, but since then has operated on a basis similar to Boston, Worcester or Springfield. Fall River has a federal order but without a market pool or location differentials to nearby producers. Providence and Connecticut markets have neither federal orders nor location differentials.

Despite the wide range of conditions, the exhibit shows a fairly close relationship between prices to nearby producers in all of these markets. It also throws some light on the question of whether location differentials place an excessive valuation on the milk of nearby producers in Boston. In Providence and Connecticut markets, without federal orders or locaton differentials, prices were generally 25 to 50 cents higher than to nearby producers in Boston. The Fall River market was most consistently higher than Boston. It has a federal order, but without a market pool or location differentials.

Perhaps the best evidence as to whether location differentials place an excessive valuation on the milk of [744] nearby producers, is to be found in the relative trends of production. At the time the present system of location differentials was adopted in the Boston order, concern was expressed that it might lead to an expansion of nearby production, at the expense of production in the more distant areas of the milkshed. This, of course, has not been the case. I offer as an exhibit a table showing the volume and percent of receipts from producers, within and outside the differential areas, by years, 1938 to 1950 inclusive.

EXAMINER ROGERS: The document referred to will be marked for identification as Exhibit No. 23.

(The document above-referred to, submitted by Witness Swonger, was marked for identification as Exhibit No. 23.)

(Discussion off the record.)

EXAMINER ROGERS: On the record.

Doctor, I notice the source of Exhibit No. 23 is Boston Milk Market Administrator figures. Are these from Market Administrator bulletins or obtained from him by you?

THE WITNESS: Taken from published reports of the Market Administrator, and the table was prepared from such published statistics under my direction and supervision.

EXAMINER ROGERS: You may proceed. I am going on the theory that after you have finished there may be some questions on all of these exhibits and we are not receiving them until we have given a chance for questions.

You may finish your statement.

[745] THE WITNESS: In the early years of the Boston order, 1938-40, receipts from producers within the 40-mile zone were from 8.5 to 9.0 per cent of total receipts from producers. Such receipts have declined both absolutely and relatively since that time, and in 1950 represented 4.2 per cent of total receipts from producers.

Similarly, receipts from producers in the 41-80 mile zone, during 1938-40, ranged a little under 3 per cent of total receipts from producers. By 1950, such receipts had declined to .5 of 1 per cent of total receipts from producers.

All producers in the differential areas, during 1938-40, accounted for about 11.5 per cent of the total receipts from producers. By 1950, this proportion had dropped to 4.7 per cent.

Receipts from producers outside the differential areas, in 1938-40, represented about 88.5 per cent of the total receipts from producers. By 1950, this proportion had increased to 95.3 per cent.

Over the decade, from 1940 to 1950, the actual volume of receipts from producers in the differential areas declined 46 per cent. Some of these producers went out of business. Others shifted into secondary markets, both federal and non-federal. During the same period of time, receipts from pro-

ducers outside the differential area increased 37 per cent. Certainly the facts do not lend any support to the argument that the present location differentials "subsidize" local [746] producers, or place an excessive valuation on the milk of these producers.

I would like to refer again to Exhibit 21, which shows the seasonal variation of producer deliveries by zones. If Northern Farms is really interested in developing a plan for "a fair sharing of the surplus" we suggest that they devote their efforts to developing some form of even-production program that will more nearly put the burden of surplus where it belongs.

EXAMINER ROGERS: Any questions with reference to these Exhibits Nos. 21, 22 and 23.

Q. (By Mrs. Henderson) I had one question as to the heading of this Exhibit No. 22. It says here across the top, "Market Administrator–Greater Boston Marketing Area" and I see no further connection with those facts. A. As I think I stated, the chart and table in its original form was prepared by the Boston Market Administrator. I have added figures required to bring it up to date.

Q. Then you didn't actually compile those figures for the earlier periods? A. Well, I suppose, as you say, the Market Administrator compiled the figures which were used in preparing the original chart and table.

Q. Does this appear in some public release? A. I believe it was prepared in connection with producer meetings of some sort, at which representatives of the Market [747] Administrator's Office were to speak.

MRS. HENDERSON: I suppose we can receive it in evidence as far as the information which Doctor Swonger has prepared and taken on faith perhaps that the rest of those figures are what he thinks they are, but apparently I had thought he had prepared the whole exhibit.

EXAMINER ROGERS: The chart at the top is representative of the figures that appear below?

THE WITNESS: Yes.

EXAMINER ROGERS: Then the same period is covered?

THE WITNESS: Yes. In so far as Boston prices are concerned, of course, they are shown in general market statistics which have already been introduced in this hearing.

Q. (By Mrs. Henderson) Do you know whether those are the blended prices established in the Rhode Island order and the Connecticut order? A. Yes, I have checked the prices for those markets and they in both cases represent a weighted average blended price pay by dealers in those markets, as computed and published by the Rhode Island Milk Control Board or the Connecticut Milk Administrator.

MRS. HENDERSON: I have no objection if he takes responsibility for the accuracy of that information.

THE WITNESS: I am willing to take responsibility for the accuracy of the Market Administrator's Office with [748] respect to the other prices.

EXAMINER ROGERS: But you are stating that they are from published figures of the Market Administrators of these various areas? In other words, they are government figures released by government agencies?

THE WITNESS: All of these figures are published by state or federal regulatory agencies.

EXAMINER ROGERS: Any further questions?

Apparently there are no further questions. Exhibits 21, 22 and 23 are received in evidence.

(The documents heretofore marked for identification as Exhibits Nos. 21, 22 and 23, submitted by Witness Swonger, were received in evidence.)

EXAMINER ROGERS: Any further questions of this witness?

Q. (By Mr. Whitney) Doctor Swonger in your statement here—this is a little personal—have you made any calculation of other class of sales that will be lost, as you call it, from the Boston pool? A. I presume you mean if there were no federal order.

Q. I mean if we eliminate location differentials. A. May I finish my statement? In Lowell, Lawrence, Worcester or Springfield, the only reference in my statement, I think, is to loss of Class I sales is related to the question of federal orders

in the secondary markets which are [749] mentioned. If there had been no federal order in those markets, the Boston pool would have been effectively precluded from selling Class I milk to those markets.

Q. Do producers within, what we call nearby producers, do they deliver more milk to the pool in May or in June? A. You are referring to Boston?

Q. Yes. A. I would have to check. My memory doesn't serve me as to whether they reach their peak in May or June. They may possibly reach it in May rather than June, but the two months are closely in line.

Q. To the extent you base some of your conclusions upon the fact the comparison of June or November, if deliveries are higher in June of this year than you have put in here, it would make some difference, would it not? A. Might make a pound or two. The reason for taking June, 94 per cent of Boston milk supply is up country, and the peak with respect to that 94 per cent occurs in June.

Q. I believe in your table, it was table 21, you made a comparison of deliveries at city plants? A. Yes.

Q. Why didn't you develop your figures to show the issue in question deliveries by producers between 41 and 80 miles for purposes of comparison? A. I don't think the figures are available in that [750] form. I had to do the best I could with what I had.

EXAMINER ROGERS: Any other questions?

Q. (By Mr. Smith) Doctor Swonger, with respect to the 41-80 mile zone, you don't know of—do you know of any producers in that area getting 23¢ premium who deliver their milk to Bellows Falls Cooperative? A. There may possibly be, but I have no knowledge of it. I would doubt it.

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751 **Testimony of Jerry Bond, Jr.**
Needham, Massachusetts

The Witness: My name is Jerry Bond, Jr. I live at 38 Edgewood Road, Needham, Massachusetts. I am employed by the Massachusets Milk Control Board as Director of Milk Control in the Division of Milk Control, Massachusetts Department of Agriculture.

The Massachusetts Milk Control Board wishes me to make a statement for them at this time on Proposal No. 10. The Massachusetts Milk Control Board wishes to be recorded in opposition to Proposal No. 10 which would eliminate the location differential. The Board opposes this amendment because this is an essential feature written into the order in 1937 after careful and full hearing.

It is not as claimed by the proponents a discriminatory provision, but one which was adopted by way of partial compensation to nearby producers for the losses which they suffered when the equalization provisions deprived them of those natural advantages which prior to federal regulation always enabled them to sell at a relatively higher percentage of their production of Class I milk.

Exhibit No. 20

Introduced by Mr. Whitney

COMPARISON OF DAILY AVERAGE DELIVERIES PER PRODUCER DURING THE MONTHS OF HIGHEST AND LOWEST PRODUCTION IN 1950, BY AREAS, ACCORDING TO DISTANCE FROM BOSTON

	High Month (1)	Low Month (2)	Difference
Within 40 miles	490	390	100
41-80 miles	310	205	105
Zones 11-15	318	228	90
" 16-17	348	258	90
" 18	338	266	72
" 19	352	232	120
" 20	356	245	111
" 21	328	237	71
" 22	326	204	122
" 23	466	275	191
" 24	465	253	212
" 25	434	233	201
" 26	377	236	141
" 27	543	261	282
" 28	519	241	278
" 29-38	401	188	213

(1) High month is June for all areas except within 40 miles, which is May.

(2) Low month is November for all areas.
Source: Boston Market Administrators Monthly Statistics

Prepared by: S. E. Whitney

Exhibit No. 21

BOSTON MARKET

Average Deliveries Per Day Per Dairy in Pounds

Producers Delivering to:	June 1950	November 1950	June as % of Nov.
City Plants	458.9	370.5	123.9
Country Plants:			
Zones 11-15	318.2	227.6	139.8
16-17	348.4	257.6	135.2
18	337.9	265.9	127.1
19	352.0	231.7	151.9
20	355.5	245.0	145.1
21	336.3	237.0	141.9
22	325.9	204.4	159.4
23	466.3	275.3	169.4
24	465.4	252.7	184.2
25	433.6	232.9	186.2
26	377.1	236.0	159.8
27	542.7	260.8	208.1
28	519.2	241.2	215.3
29-38	401.1	187.6	213.8
Averate (sic) — All Producers	389.0	241.5	161.1

Source: Boston Milk Market Administrator, Monthly Statistics.

BOSTON MARKET

Receipts of Milk from Producers (000 lbs.)

Year	Within 40 miles of Boston	41-80 miles from Boston	More than 80 miles from Boston	Total
1938	86,904	29,351	903,732	1,019,987
1939	96,739	29,050	953,782	1,079,571
1940	97,828	28,859	1,007,701	1,134,388
1941	97,202	28,815	1,057,823	1,183,840
1942	88,501	21,726	1,092,386	1,202,613
1943	72,932	13,741	1,120,789	1,207,462
1944	66,012	10,183	1,232,851	1,309,046
1945	57,231	9,987	1,280,456	1,347,674
1946	51,513	7,850	1,150,383	1,209,746
1947	54,695	7,185	1,262,423	1,324,303
1948	55,112	7,110	1,237,182	1,299,404
1949	60,812	7,150	1,387,236	1,455,198
1950	61,458	6,760	1,378,439	1,446,657

Percentage of Total Receipts of Milk from Producers

1938	8.5	2.9	88.6	100.0
1939	9.0	2.7	88.3	100.0
1940	8.6	2.6	88.8	100.0
1941	8.2	2.4	89.4	100.0
1942	7.4	1.8	90.8	100.0
1943	6.1	1.1	92.8	100.0
1944	5.0	0.8	94.2	100.0
1945	4.3	0.7	95.0	100.0
1946	4.3	0.6	95.1	100.0
1947	4.1	0.6	95.3	100.0
1948	4.2	0.6	95.2	100.0
1949	4.2	0.5	95.3	100.0
1950	4.2	0.5	95.3	100.0

Source: Boston Milk Market Administrator. Revised figures through September 1950, preliminary figures thereafter.